Supreme Court, U.S.
FILED

01139 5 MAR 18 2002

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

SPRINKLER FITTERS LOCAL 417,

Petitioner,

v.

MINNESOTA CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., a Minnesota Corporation; NORTH CENTRAL CHAPTER OF THE AMERICAN FIRE SPRINKLER ASSOCIATION, an unincorporated association; ALLIED MECHANICAL SYSTEMS OF HUTCHINSON, INC., a Minnesota corporation; EBERT & HINSON FIRE PROTECTION, INC., a Minnesota corporation; GENERAL SPRINKLER CORPORATION, a South Dakota corporation,

and

MINNESOTA DEPARTMENT OF PUBLIC SAFETY and THE COMMISSIONER OF PUBLIC SAFETY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Richard A. Williams, Jr.
Counsel of Record
Paul W. Iversen
WILLIAMS & IVERSEN, P.A.
1611 West County Road B, Suite 208
Roseville, MN 55113
(651) 848-0280

Attorneys for Petitioner Sprinkler Fitters Local 417

2002 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

115PP

QUESTIONS PRESENTED FOR REVIEW

1. Did Congress intend, in passing the Employee Retirement Income Security Act of 1974 ("ERISA") to preempt all state regulation of apprenticeship programs, medical clinics, daycare centers, and legal service clinics?

2. Is a statute requiring that apprentices be registered with the state before they may install a fire protection system, preempted by ERISA?

3. Are rules promulgated by a state, which set forth substantive requirements of apprenticeship programs before they may be approved by that state, preempted by ERISA?

4. Is a state statute requiring registration of apprentices, which allows apprentices to be registered through the United States Department of Labor, saved from preemption by 29 U.S.C. §1144(d)?

LIST OF ALL PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties to this proceeding are accurately listed in the caption of this case. Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, petitioner, Sprinkler Fitters Local 417, makes the following disclosure:

Local 417 is an unincorporated association, which is a labor organization as defined under the laws of the United States. As an unincorporated association, it has no stock and no publicly held entity owns any portion of petitioner.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

CITATION OF OPINIONS BELOW 1

STATEMENT OF THE BASIS FOR JURISDICTION 1

STATUTES INVOLVED IN THIS CASE 1

STATEMENT OF THE CASE 2

ARGUMENT 6

I. CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE EIGHTH CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S PRECEDENT. 7

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS OVER ERISA PREEMPTION OF APPRENTICESHIP PROGRAMS. 20

CONCLUSION 24

APPENDIX A-1

TABLE OF AUTHORITIES

CASES

Boise Cascade v. Peterson, 939 F.2d 682 (8th Cir. 1991) 5, 20

California Division of Labor Standards Enforcement v. Dillingham Construction, Inc., 519 U.S. 316 (1997) ..... passim

DeBuono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806 (1997) ..... passim

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995) ..... passim

Willmar Electric Service, Inc. v. Cooke, 212 F.3d 533 (10th Cir.) *cert. denied*, 531 U.S. 979 (2000) ..... passim

STATUTES

Federal

28 U.S.C. §§1291 and 1292(a)(1) 5

28 U.S.C. §1254(1) 1

28 U.S.C. §1331 2

29 U.S.C. §50 18

29 U.S.C. §1002(1) 1, 9

29 U.S.C. §1144(a) 1

29 U.S.C. §1144(d) ..... i, 19

State

Alabama Code 33-3-30 15

Alabama Code 34-5-2 15

Alaska Statutes § 08.71.160 15

Arkansas Code § 17-38-301 15

Arkansas Code § 17-38-304 15

Connecticut General Statutes § 20-334 15

Idaho Code § 54-1007 15

Illinois Statutes, Chapter 225 §320/3 15

Massachusetts General Laws, Chapter 142 §3 16

Minn. Stat. §229M.03, subds. 1 and 2 1

Minn. Stat. §299M.01, subds. 1 and 2 1

Minn. Stat. §299M.03, subd.2 2

Minn. Stat. §299M.04 2

North Carolina General Statutes §93D-9 16

North Dakota Century Code §43-18-11 16

RULES

Fed.R.Civ.P. 24(b) 5

Fed.R.Civ.P. 60 4

Minnesota Rules Chap. 7512 3

Supreme Court Rule 10(a) 6

Supreme Court Rule 10(c) 6

OTHER AUTHORITIES

1992 Minnesota Laws, Chap.508 2

CITATION OF OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals in this matter is reported at 267 F.3d 807. The opinion of the District Court in this matter has not been reported. The order is referred to as Order on Motion to Intervene and Dissolve Injunction, Case No. 94-CV-97, United States District Court for the District of Minnesota, Judge Michael J. Davis, filed August 10, 2000. That order refused to dissolve an earlier injunction issued in the same matter by the same Court and filed on March 26, 1996.

STATEMENT OF THE BASIS FOR JURISDICTION

The initial judgment of the Eighth Circuit Court of Appeals in this matter was entered on October 5, 2001. Sprinkler Fitters Local 417 filed a petition for rehearing *en banc*. The petition for rehearing *en banc* and for rehearing by the panel, was denied by the Eighth Circuit Court of Appeals by order filed December 18, 2001. This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

29 U.S.C. §1144(a) Supersedure; effective date. Included in Appendix.

29 U.S.C. §1002(1). Included in Appendix.

Minn. Stat. §299M.01, subds. 1 and 2: Definitions. Included in Appendix.

Minn. Stat. §229M.03, subds. 1 and 2: License or certificate required. Included in Appendix.

Minn. Stat. §299M.04 Rules, fees, orders, penalties. Included in Appendix.

STATEMENT OF THE CASE

This case was initially brought by plaintiffs, Minnesota Chapter of Associated Builders and Contractors ("ABC"), and certain affiliated contractors, claiming that the Minnesota Sprinkler Fitter Licensing Statute and rules, Minnesota Chap. 299M and Minnesota Rules Chap. 7512, were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), to the extent that the statute and rules required that apprentices be registered before they were allowed to install fire sprinkler systems in the State of Minnesota. The underlying action was initially brought by complaint dated February 18, 1994. Appendix ("App.") at A-59. Jurisdiction in the district court was based on 28 U.S.C. §1331, since the suit arose under a law of the United States, ERISA.

The Minnesota legislature passed the Sprinkler Fitter Licensing Law in 1992. *See, 1992 Minnesota Laws, Chap.508.* The statute was codified as Minn. Stat. Chap.299M. Section 299M.04 gave statutory authority to the Minnesota Department of Public Safety to promulgate rules governing Chap.299M. A key component of the Sprinkler Fitter Licensing Law was the requirement that fire protection related work, as defined in the statute, could only be performed by licensed journeymen and registered apprentices. Minn. Stat. §299M.03, subd.2. Workers could not install fire sprinkler systems in the State of Minnesota unless they had either obtained a journeyman certificate, or were actively enrolled in a registered apprenticeship program and registered with a federal or state agency that approved apprenticeship programs. The statute required only that apprentices be registered with a state or federal approval agency. The statute did not define what were state or federal approval agencies,

and placed no substantive requirements on any apprenticeship program, it simply required apprentices to be registered.

The Minnesota Department of Public Safety promulgated rules putting into effect the statutory provisions of Minn. Stat. Chap. 299M. *See*, Minn. Rules Chap. 7512, relevant portions of which are in the appendix at A-76 to A-84. At the time these rules were proposed, two approval agencies already existed for approval of apprenticeship programs in Minnesota. The federal government operated the United States Department of Labor, Bureau of Apprenticeship and Training, which approved apprenticeship programs and registered apprentices. The state, through the Minnesota Department of Labor and Industry, also approved apprenticeship programs and registered apprentices. The Department of Public Safety elected to define the state and federal approval agencies, as defined in the statute, to be the existing federal and state apprenticeship approval agencies, or an equivalent agency in another state, rather than create an entirely separate approval structure for sprinkler fitters.

Certain employers that operated apprenticeship programs that had not been registered with either the United States Department of Labor, Bureau of Apprenticeship and Training, or the Minnesota State Department of Labor and Industry, opposed the proposed rules, arguing that the Minnesota Department of Public Safety should act as its own approval agency, and that the requirements for registration of the existing approval agencies could not be applied to these employers' programs, because they alleged that ERISA preempted any state requirements with respect to apprenticeship programs. The employers were unsuccessful in their attempts to prove that there was not need and reasonableness for the rules, however, and the rules were promulgated properly by the Minnesota Department of Public Safety.

Soon after the rules were promulgated, plaintiffs brought this suit seeking an injunction preventing the Minnesota

Department of Public Safety from enforcing the Minnesota Sprinkler Fitter Licensing Law, and the rules promulgated thereunder, to the extent that the statute and rules attempted to place any requirements on apprenticeship programs. On March 26, 1996, the United States District Court for the District of Minnesota filed a Memorandum and Order resolving the case. The Court entered a permanent injunction enjoining the Minnesota Department of Public Safety from: 1) requiring the registration of apprentice sprinkler fitters, 2) requiring fire protection contractors to employ only registered apprentices, and 3) requiring fire protection contractors to employ apprentices and journeymen in a specified ratio. Appendix at A-51 to A-52. The March 26, 1996, order was not appealed and remains in effect today. Since the injunction was issued, the State of Minnesota has been unable to verify that "apprentice" sprinkler fitters are, in fact, enrolled in any sprinkler fitter apprenticeship or training program. Thus, any person, regardless of skill or training, can claim to be an apprentice sprinkler fitter in Minnesota, and the Department of Public Safety cannot challenge that claim. The statute and rules have not been repealed or changed with respect to those portions affected by the injunction since the injunction was issued.

After the injunction was issued in 1996, however, this Court decided a case directly involving ERISA preemption of apprenticeship statutes. *See, California Division of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316 (1997). The *Dillingham* case, and other recent Supreme Court ERISA preemption cases, established new criteria for determining whether ERISA preempted state law. Sprinkler Fitters Local 417, a labor organization representing journeymen and registered apprentice sprinkler fitters in the State of Minnesota, initially attempted to convince the Minnesota Department of Public Safety to move, pursuant to Fed.R.Civ.P. 60, to have the injunction dissolved because of an intervening change in the law. The Department of Public

Safety was unwilling to commit public funds to dissolving the injunction, but indicated it would not oppose any attempt by Local 417 to intervene in the matter and dissolve the injunction. Local 417 then moved in the district court to intervene in this action and for the court to dissolve the injunction issued on March 26, 1996. The district court granted Sprinkler Fitters Local 417 permissive intervention pursuant to Fed.R.Civ.P. 24(b), but denied Sprinkler Fitters Local 417's motion to dissolve the injunction. Appendix at A-33 to A-37. The district court found that *Dillingham*, and other Supreme Court cases, had not overruled the earlier Supreme Court precedent upon which *Boise Cascade v. Peterson*, 939 F.2d 682 (8th Cir. 1991), the Eighth Circuit case upon which it had relied in issuing the March 26, 1996, injunction, had been based. The district court, thus, refused to depart from *Boise Cascade*, and refused to dissolve the injunction. Sprinkler Fitters Local 417 appealed that order to the Eighth Circuit Court of Appeals. The Eighth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. §§1291 and 1292(a)(1), as it was an appeal of a final decision of the United States District Court for the District of Minnesota and the order refused to dissolve an injunction.

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the lower court's decision. Appendix at A-7 to A-32. The Eighth Circuit decided that the statute and rules, taken together, require fire protection contractors in the State of Minnesota to adopt state approved apprenticeship programs. The Eighth Circuit found that requiring the adoption of a program had a connection with an ERISA plan and was, thus, preempted by ERISA. The Eighth Circuit also found that the statute and rules were not protected by the ERISA savings clause because the rules relating to approval of apprentice programs did not specifically mention that approval by a federal agency would suffice for the Minnesota requirements, even though the sprinkler fitter statute and rules both specifically state that federal approval, or approval by a

state other than Minnesota, suffices to meet requirements of the Minnesota statute. Local 417 petitioned for rehearing *en banc*, and for rehearing by the panel. By order dated December 18, 2001, the Eighth Circuit denied both requests of the petition for rehearing. Appendix at A-4 to A-5. Local 417 now seeks United States Supreme Court review of this erroneous decision of the United States Court of Appeals for the Eighth Circuit.

ARGUMENT

Petitioner, Sprinkler Fitters Local 417, respectfully requests the United States Supreme Court to grant its petition for writ of certiorari on the basis of Rule 10(a) and Rule 10(c) of the Rules of the Supreme Court of the United States. Review is appropriate pursuant to Rule 10(a) because the decision of the Eighth Circuit for which review is sought is in conflict with a decision of the Tenth Circuit Court of Appeals, *Willmar Electric Service, Inc. v. Cooke*, 212 F.3d 533 (10th Cir.) *cert. denied*, 531 U.S. 979 (2000). Review of this case is appropriate under Rule 10(c) because the Eighth Circuit decided an important question of federal law, whether ERISA preempts all state substantive regulation of apprenticeship programs simply because some such programs may be funded through ERISA plans, in a way that conflicts with the decisions of this Court in *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316 (1997); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995); and *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997).

I. CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE EIGHTH CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S PRECEDENT.

The Eighth Circuit's decision in this matter reflects an expansive view of ERISA preemption that has been explicitly rejected by this Court. In *Travelers*, this Court admitted that "we have to recognize that our prior attempt to construe the phrase 'relate to' does not give us much help drawing the line here." *Travelers*, 515 U.S. at 655. Starting with the *Travelers* decision, this Court rejected its previous expansive reading of ERISA preemption in favor of a more practical view of ERISA preemption. Lower courts, however, have been slow at times to recognize this change in ERISA jurisprudence. This Court noted that the Second Circuit failed to give sufficient weight to the change brought about by the *Travelers* case:

> When the Second Circuit initially found the HFA preempted as applied to fund operated hospitals, that court relied substantially on an expansive and literal interpretation of the words 'relate to' in Section 514(a) of ERISA. In reconsidering the case on remand, the court appears to have adhered to that approach failing to give proper weight to *Travelers* rejection of a strictly literal reading of Section 514(a).

DeBuono, 520 U.S. at 812-813 (emphasis added). This Court, thus, specifically directed the Circuit Courts of Appeal to recognize the change in the preemption analysis brought about by *Travelers*. The Eighth Circuit's decision in this case fails to recognize that change in analysis and, like the Second Circuit's decision in *DeBuono*, should be reviewed and changed by this Court.

The Eighth Circuit decision attempts to distinguish *Dillingham* and *Willmar Electric* on factual grounds, but does not give sufficient weight to the change in analysis established by this Court in *Travelers, Dillingham* and *DeBuono*. There are factual distinctions among the statutes involved in the *Dillingham* and *Willmar Electric* cases, and the sprinkler fitter licensing statute, but those factual distinctions do no alter the basic conclusions of this Court that:

> The wages to be paid on public works projects and the substantive standards to be applied to apprenticeship training programs are, however, quite remote from the areas with which ERISA is expressly concerned – reporting, disclosure, fiduciary responsibility, and the like. ... Given the paucity of indication in ERISA and its legislative history of any intent on the part of Congress to preempt state apprenticeship training standards, or state prevailing wage laws that incorporate them, we are reluctant to alter our ordinary assumption that the historic police powers of the state are not to be superceded by the federal act.

Dillingham, 519 U.S. at 330-332 (internal citations omitted; emphasis added). This Court in *Dillingham* specifically held that not all apprenticeship programs are ERISA plans, and that there was nothing in the statute or legislative history of ERISA that indicated that Congress intended to supplant the traditional state regulation of the substantive terms of apprenticeship programs. The Eighth Circuit's decision in this matter ignores this basic determination in *Dillingham*. The Eighth Circuit does not explain how, starting with the presumption that Congress did not intend to preempt the Minnesota sprinkler fitter licensing statute, there is anything

within ERISA that indicates Congress did have such an intention.

The Eighth Circuit decision fails to recognize an essential distinction, recognized by this Court in *DeBuono*, between an ERISA plan, which funds the providing of certain services, and the substantive programs which provide those services. An employee welfare benefit plan is defined by ERISA as:

> Any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purposes of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or daycare centers, scholarship funds, or prepaid legal services[.]

29 U.S.C. §1002(1).

An ERISA plan is, thus, established or maintained to provide for its participants or beneficiaries certain benefits. Among those benefits are "medical, surgical, or hospital care," "apprenticeship or other training programs," "daycare centers," and "prepaid legal services." 29 U.S.C. §1002(1). ERISA makes no distinction between apprenticeship or other training programs and hospitals, daycare centers, and prepaid legal services programs with respect to their ERISA plan status. This Court in *Dillingham* specifically found that not all apprenticeship programs are ERISA plans, only those programs funded separately from the general assets of the employer. Thus, it is not the apprenticeship program itself,

but its funding mechanism, that brings an apprenticeship program under the auspices of ERISA.

The Eighth Circuit decision finds any substantive regulation of an apprenticeship program, including the mere registration of apprentices with the state, to be preempted by ERISA, even though not all apprenticeship programs are funded through ERISA plans. If the Eighth Circuit's decision is allowed to stand, states in the Eighth Circuit will be powerless to regulate hospitals, medical clinics, daycare centers, or legal services agencies in any way, not because they are, in fact, funded through ERISA plans, but simply because they could be funded through ERISA plans. The Eighth Circuit's decision is not simply limited to sprinkler fitter apprentices in the State of Minnesota, but will have broad reaching implications for all industries, some of the activities of which could be funded by ERISA plans. That broad ranging result was not necessary and ignores this Court's existing precedent.

This Court has specifically recognized the distinction between an ERISA plan and the services funded through the plan. In *DeBuono*, ERISA plan owned hospitals argued that they should not be subject to a tax on hospitals because that tax was allegedly preempted by ERISA. The definition of employee welfare benefit plan states that such a plan can be established to provide hospital care or apprenticeship or other training programs, without making any distinction between the provision of hospital care and the provision of apprenticeship or other training programs. This Court stated, with respect to hospitals owned by ERISA plans:

> The HFA is a tax on hospitals. Most hospitals are not owned or operated by ERISA funds. This particular ERISA fund has arranged to provide medical benefits for its plan beneficiaries by running hospitals directly, rather than by purchasing the same services at independently run hospitals. If the fund

> had made the other choice, and had purchased health care services from a hospital, that facility would have passed the expense of the HFA onto the fund and its plan beneficiaries through the rates it set for the services provided.

DeBuono, 520 U.S. at 816. This Court, thus, specifically recognized the distinction between the ERISA plan, which funds the provision of hospital services, and the hospital which actually provides those services.

In the case of apprenticeship or other training programs, the ERISA plan provides apprenticeship or other training benefits to its beneficiaries. It can do so either by purchasing those services on the open market, or by running its own program. The fact that some apprenticeship programs are run by a single employer who hires all of the apprentices in the program, the equivalent of an ERISA plan operating its own hospital, does not exempt the apprenticeship program itself from regulation, since the program is not the plan. The ERISA plan is the funding mechanism through which apprenticeship or other training services are provided to plan beneficiaries. The ERISA plan is not the program that provides the substantive apprenticeship or other training.

Under this Court's ERISA preemption analysis, the lower courts are required to review a statute with the starting presumption that ERISA did not intend to preempt the statute, and to determine whether the statute is of the type that Congress intended to preempt by enacting ERISA, and only if the statute is of that type to find the statute preempted. This Court has clearly stated the appropriate analysis of ERISA preemption issues:

> As is always the case in our preemption jurisprudence, where federal law is said to bar state action in fields of traditional state regulation, we have worked on the assumption that the historic

> police powers of the states were not to be superceded by the federal act unless that was the clear and manifest purpose of Congress.

Dillingham, 519 U.S. at 325 (internal quotations omitted). This Court recognized that:

> We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.

Travelers, 514 U.S. at 656.

The Eighth Circuit decision does not explain how, starting with the presumption that Congress did not intend to supplant state law in the admittedly traditional area of state regulation involving apprenticeship standards, there was any indication that Congress had a clear and manifest purpose of preempting all substantive regulation of apprenticeship programs. Under the Eighth Circuit view, Congress intended to leave the area of substantive apprenticeship standards completely unregulated. Moreover, according to the Eighth Circuit, Congress intended, by enacting ERISA, to leave medical clinics, hospitals, daycare centers, law firms, and apprenticeship and other training programs completely unregulated simply because some of the entities providing those services could be owned by an ERISA plan. There is no meaningful way under the statute to distinguish an ERISA plan owned hospital, legal clinic, or daycare center, from an ERISA plan owned apprenticeship program.

This Court has itself recognized the importance of considering the implications of preemption in determining a preemption issue:

> [A]ny conclusion other than the one we draw would bar any state regulation of hospital costs. The basic DRG system (even without any surcharge), like any other interference with the hospital services market, would fall on a theory that all laws with indirect economic effects on ERISA plans are preempted under Section 514(a). This would be an upsetting result and all the more startling because several states, including New York, regulated hospital charges to one degree or another at the time ERISA was passed. And yet there is not so much as a hint in ERISA's legislative history or anywhere else that Congress intended to squelch these state efforts.

Travelers, 514 U.S. at 664 (citations omitted).

The Eighth Circuit failed to consider the implications of its holding in concluding that the Minnesota sprinkler fitter statute and rules are preempted by ERISA. The Eighth Circuit's conclusion bars any state regulation of not only apprenticeship programs but hospitals, daycare centers and legal service programs as well. The Eighth Circuit reached its conclusion by confusing the ERISA plan with the program providing the substantive services to the ERISA plan. It also did so by reading "relate to" too literally.

Under this Court's established ERISA preemption analysis, lower courts must look to the objectives of ERISA to determine the scope of statutes Congress intended would survive its enactment of ERISA. This Court explained in *Dillingham* that:

> In enacting ERISA, congress's primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employee benefits from accumulated funds. To that end, it established extensive reporting, disclosure,

> and fiduciary duty requirements to ensure against the possibility that the employees' expectation of the benefit would be defeated through poor management by the plan administrator.

California Division of Labor Standards Enforcement v. Dillingham Construction, 519 U.S. 316, 326-327 (1997)). This Court has also noted that ERISA:

> Does not go about protecting plan participants and their beneficiaries by requiring employers to provide any given set of minimum benefits but instead controls the administration of benefit plans, as by imposing reporting and disclosure mandates, participation and vesting requirements, funding standards, and fiduciary responsibilities for plan administrators. It envisions administrative oversight, imposes criminal sanctions, and establishes a comprehensive civil enforcement scheme. It also preempts some state law.

Travelers, 514 U.S. at 651 (citations omitted).

Congress certainly intended to make a sweeping change in the law with respect to employee benefit funding in enacting ERISA. Congress intended to encourage employers to adopt welfare benefit plans in part by providing for uniform national administration of those plans. Congress, however, said nothing with respect to substantive safety standards with respect to any of the areas for which benefits could be provided.

This Court has specifically recognized that Congress did not intend to preempt the field of healthcare regulation in enacting ERISA. *See, e.g., Travelers; DeBuono*. This Court has also recognized that the substantive standards to be applied to apprenticeship programs is far removed from the

traditional areas with which ERISA is concerned. *Dillingham*. There is no evidence in the legislative history, or elsewhere, that Congress intended through passage of ERISA, to leave the field of substantive standards for apprenticeship programs completely unregulated. That is, however, the inescapable result of the Eighth Circuit's decision in this case. Since Congress in no way regulates the substantive standards to be applied to apprenticeship programs through ERISA, if ERISA preempts those substantive standards, then Congress must have intended that vast area of traditional state regulation to be completely unregulated.

The Eighth Circuit makes this determination despite the fact that at the time ERISA was enacted, many states already required apprentices to meet state imposed substantive standards. *See, e.g. Alabama Code* 33-3-30 (1931 Statute that states with respect to river pilots "The commission shall be sole judge of the seniority and qualifications of applicants to be apprenticed and branched"); *Alabama Code* 34-5-2 (1971 Statute requiring registration of apprentice barbers); *Alaska Statutes* § 08.71.160 (1973 Statute requiring registration of apprentice dispensing opticians and setting ratio of 2 apprentices to each licensed dispensing optician); *Arkansas Code* § 17-38-301 (1951 Statute requiring registration of apprentice plumbers); *Arkansas Code* § 17-38-304 (1951 Statute requiring apprentice plumbers to complete training "as defined under the plumber apprentice regulations" before being allowed to take the journeyman examination); *Connecticut General Statutes* § 20-334 (1965 statute that requires, *inter alia*, apprentice electricians, plumbers and fire protection sprinkler craftsman to be registered and be "subject to all of the regulations adopted under this chapter for the purpose of governing apprenticeship training"); *Idaho Code* § 54-1007 (1947 Statute requiring apprentice electricians to register, verify annual hours worked, and complete the required hours of additional instruction.); *Illinois Statutes*, Chapter 225 §320/3 (1953 Statute establishing requirements

for apprentice plumbers and mandatory ratio of journeyman to apprentice plumbers.); *Massachusetts General Laws*, Chapter 142 §3 (1948 Statute requiring registration of apprentice plumbers); *North Dakota Century Code* §43-18-11 (1941 Statute requiring registration of plumber apprentices); *North Carolina General Statutes* §93D-9 (1969 Statute requiring registration of apprentice hearing aid dealers and fitters). All of the cited statutes, as well as others, were in existence at the time ERISA was passed and have not been repealed since ERISA was enacted.

Despite the pervasiveness of state regulation of apprenticeship programs at the time ERISA was passed, Congress did not state in the legislative history of the statute that Congress intended to preempt that substantial body of state regulation by enactment of ERISA. Only the most formalistic interpretation of the "relate to" language in ERISA could reach the incongruous result that Congress intended to supplant such a pervasive area of state regulation without ever explicitly saying so.

The field of substantive standards for apprenticeship programs was simply never intended by Congress to be preempted by ERISA. This Court has mandated that in determining whether ERISA preempts a state statute, Circuit Courts of Appeal must analyze whether the statute was one that Congress had the clear and manifest purpose to preempt by ERISA. The Eighth Circuit fails to undergo this rigorous analysis in determining whether the Minnesota statute and rules are preempted by ERISA.

One of the key areas of concern of Congress in enacting ERISA was nationwide uniformity in administration of employee benefit plans. Properly understood, the plan is the funding mechanism that pays for the apprenticeship training, not the substantive apprenticeship training program itself, but even if the apprenticeship training program itself is analyzed, nothing about the Minnesota sprinkler fitter statute and rules interferes with nationwide uniformity of administration of any

apprenticeship program. The Minnesota statute allows for registration in one of three ways, with the federal government, State of Minnesota, or with another state. If an apprenticeship plan operates only within the State of Minnesota, then it would have to register its apprenticeship program with the Minnesota State Department of Labor and Industry, since that is also the approval agency for federal apprenticeship programs in Minnesota. If an apprenticeship program only operates in Minnesota, however, there is no concern with nationwide uniformity of benefits such that ERISA would be implicated. If a program operates in states other than Minnesota, the program can register with the U.S. Department of Labor or with another state, and those registrations will be recognized by Minnesota. The Minnesota statute and rules, therefore, do not in any way affect nationwide uniformity of any apprenticeship program. Since nationwide uniformity of the program is the only conceivable ERISA object that could be affected by the Minnesota statute and rules, those rules are not of the type that Congress intended to preempt by enactment of ERISA. The Eighth Circuit's analysis fails to consider properly the objects of ERISA in determining what statutes Congress intended would survive its enactment of ERISA in finding the Minnesota sprinkler fitter statute and rules to be preempted.

The Eighth Circuit failed to follow appropriately this Court's precedent regarding the distinction between ERISA plans and the substantive programs funded through those plans, and failed to consider appropriately congressional intent as required by this Court in its ERISA preemption analysis. Because of this clear departure from this Court's precedent on the important issue of the traditional state power to impose substantive standards upon apprentices in order to protect the health and safety of citizens of the state, a writ of certiorari is appropriate to review the decision of the Eighth Circuit in this case.

The Eighth Circuit also erred in failing to find the Minnesota sprinkler fitter statute and rules saved from preemption by ERISA's savings clause. That clause states:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supercede any law of the United States (except as provided in Sections 1031 and 1137(c) of this Title) or any rule or regulation issued under any such law.

29 U.S.C. §1144(d). The Minnesota sprinkler fitter licensing statute and rules allows for approval of apprenticeship programs by the United States Department of Labor pursuant to the Fitzgerald Act, 29 U.S.C. §50. Congress enacted the Fitzgerald Act long before ERISA. The act was passed to encourage employers to develop apprenticeship programs in order to assure a steady flow of skilled workers in various trades. The Fitzgerald Act established the United States Department of Labor, Bureau of Apprenticeship and Training, and encouraged states to set up similar agencies to monitor apprenticeship programs. The Minnesota Department of Labor and Industry's Division of Voluntary Apprenticeship is a program established pursuant to the Fitzgerald Act. Many of the state statutes referred to earlier were enacted pursuant to the Fitzgerald Act. Because the Fitzgerald Act establishes a federal agency for registration of apprenticeship programs, and the Minnesota sprinkler fitter licensing statute and rules recognize any program registered through that national program, it would impair the operation of the Fitzgerald Act to find that ERISA preempts such apprentice program regulation.

Congress developed a scheme for substantive regulation of apprenticeship programs in the Fitzgerald Act. Congress made no mention of any intention to supercede the Fitzgerald Act in its enactment of ERISA. The Minnesota sprinkler fitters statute and rules, allowing programs registered with the

United States Department of Labor, Bureau of Apprenticeship and Training, pursuant to the Fitzgerald Act to provide apprentices in Minnesota, should have been found by the Eighth Circuit to be saved from preemption by 29 U.S.C. §1144(d).

The Eighth Circuit failed to do so only because it referred to the Minnesota requirements for registration of apprentice programs, and noted that they do not specifically refer to registration through the United States Department of Labor as being sufficient to meet registration requirements in Minnesota. The Eighth Circuit, however, quotes the rules of the Minnesota Department of Labor and Industry, Division of Voluntary Apprenticeship. The Minnesota sprinkler fitter statute and rules are both explicit that apprenticeship programs within the state can meet either the federal requirements, or the Minnesota requirements, or the requirements of another state. The fact that the Minnesota requirements themselves do not refer to the federal standards is, therefore, a *non sequitur*. The Minnesota sprinkler fitter licensing statute and rules, which are at issue here, do specifically allow for registration of apprentices through the United States Department of Labor. Since the Minnesota sprinkler fitter licensing statute and rules recognize apprentices registered through programs established pursuant to the Fitzgerald Act, another federal law, they are saved from preemption under 29 U.S.C. §1144(d). Sprinkler Fitters Local 417, therefore, respectfully requests this Court to grant its petition for writ of certiorari to review the Eighth Circuit decision, which does not give appropriate weight to the Fitzgerald Act in finding the Minnesota sprinkler fitter licensing statute and rules to be preempted by ERISA.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS OVER ERISA PREEMPTION OF APPRENTICESHIP PROGRAMS.

The Tenth Circuit decided *Willmar Electric* on May 16, 2000. In that case, Willmar Electric Service, Inc., a Minnesota corporation, challenged the Colorado statute requiring that electricians working within the State of Colorado be either licensed journeymen or apprentices supervised by a licensed journeyman in a one-to-one ratio. Willmar Electric Service stated that its apprenticeship program, which it argued was an ERISA plan, established a different ratio of journeymen to apprentices and, thus, the Colorado ratio could not be applied to it as ERISA preempted substantive regulation of ERISA plans. Willmar Electric Service, Inc., relied heavily on *Boise Cascade Corp. v. Peterson*, 939 F.2d 632 (8th Cir. 1991), in its arguments.

In a detailed analysis of this Court's precedent, the Tenth Circuit concluded that ERISA did not preempt substantive regulation of apprentices, and notwithstanding the fact that the apprenticeship program in question specified a different ratio of supervision than specified in the Colorado statute, the Colorado statute was not preempted by ERISA. The Tenth Circuit noted that Congress' primary concern in enacting ERISA was mismanagement of funds accumulated to finance employee benefits. *Willmar Electric*, 212 F.3d at 536. The Tenth Circuit also noted that apprenticeship regulation was a traditional area of state regulation, and that this Court had specified that the substantive standards to be applied to apprenticeship programs were quite remote from the core areas with which ERISA is concerned. *Willmar Electric*, 212 F.3d at 537. The Tenth Circuit held that a state statute establishing a ratio of journeymen to apprentices for work performed in the state was not the type of statute that

congress intended to preempt when enacting ERISA, and the Colorado statute was, therefore, not preempted by ERISA.

The Eighth Circuit's decision in this case is in direct conflict with the Tenth Circuit's decision in *Willmar*. In this case, the injunction affirmed by the Eighth Circuit specifically and permanently enjoins the Minnesota Department of Public Safety from: 1) requiring the registration of apprentice sprinkler fitters; 2) requiring fire protection contractors to employ only registered apprentices; and 3) requiring fire protection contractors to employ apprentices and journeymen in a specified ratio. App. at A-51 to A-52. Thus, the Eighth Circuit was faced with precisely the same question as the Tenth Circuit, whether a state imposed ratio of journeymen to apprentices was preempted by ERISA. The Eighth Circuit affirmed the injunction of the district court in full, not making any distinction between the apprentice ratio portion of the injunction and other portions of the injunction. The Eighth Circuit decision is, thus, in direct conflict with the Tenth Circuit decision, since it finds an apprentice to journeyman ratio established by the State of Minnesota to be preempted, while the Tenth Circuit finds a similar ratio established by the State of Colorado not to be preempted. Ratios of apprentices to journeymen are established by many states with respect to many occupations. It is an important question of federal law whether such ratios are preempted by ERISA. This Court should grant certiorari in order to resolve the conflict between the Circuits over whether state established ratios of journeymen to apprentices working in occupations within the state are preempted by ERISA.

The other aspects of the injunction relate to registration of apprentices and employment of registered apprentices. The injunction, affirmed by the Eighth Circuit, finds the Minnesota statute preempted as well as the rules. The Minnesota statute simply requires registration of apprentices. There is nothing about the simple requirement of registration

that places any substantive standard on apprenticeship programs. Registration could simply require that apprentices provide their name and address to the state. The statutory reference to registration of apprentices has no necessary connection with the substantive standards established for apprentices by the state. Yet the Eighth Circuit affirmed an injunction that prevents the State of Minnesota from requiring registration of apprentices even if that requirement places no substantive requirements on any apprenticeship program.

While the Eighth Circuit attempted to distinguish *Willmar Electric*, its attempts are unavailing. The Eighth Circuit attempts to distinguish *Willmar Electric* by stating that the Minnesota statute and rules require the actual adoption of an approved apprenticeship program before a fire protection contractor can use any apprentices in the State of Minnesota. This supposed distinction, however, ignores the fact that the statute's mere reference to registration of apprentices does not require adoption of an approved program, it is only the rules interpreting that statutory language that arguably require adoption of an approved program. Yet the injunction finds both the statutory requirement of registration and the substantive requirements placed on the programs to be preempted by ERISA. The Eighth Circuit cannot avoid this conflict with the Tenth Circuit by focusing on only one aspect of the statute and rules. The statute itself does not intrude on the operations of an apprenticeship program in any way, and finding the mere statutory reference to registration of apprentices to be preempted is in direct conflict with the Tenth Circuit's decision in *Willmar Electric*.

The Eighth Circuit also ignores the fact that the injunction specifically prevents the Minnesota Department of Public Safety from establishing any ratio of journeymen to apprentices in the sprinkler fitter industry in Minnesota. That portion of the injunction is in direct conflict with the Tenth Circuit's *Willmar Electric* decision, which finds that such ratios are not preempted by ERISA.

Despite its attempts to do so, the Eighth Circuit decision cannot be harmonized with the Tenth Circuit's *Willmar Electric* decision. The district court order went far beyond enjoining the requirements that fire sprinkler apprenticeship programs meet state substantive requirements for approval before apprentices enrolled in those programs could install fire sprinkler systems in the State of Minnesota. The order enjoins any registration of apprentices, even if such registration places no substantive requirements on the apprenticeship programs, and enjoins any state established ratio of journeymen to apprentice sprinkler fitters in the State of Minnesota.

This broad injunction is in direct conflict with the Tenth Circuit's decision in *Willmar Electric*. Under the Eighth Circuit's decision, no state can place any requirement on any apprentice, not even the requirement that the apprentice let the state know who the apprentice is, and no state can establish any ratio of journeymen to apprentices in any occupation. The Tenth Circuit held that a state established ratio of journeymen to apprentices was not preempted by ERISA. The requirement of registration of apprentices is far less onerous than the state established ratio of journeymen to apprentices and has even less of a connection with any apprenticeship program. This broad injunction, affirmed in full by the Eighth Circuit, effectively prevents states in the Eighth Circuit from referring to apprentices in any way in their statutes. Such a broad reading of ERISA preemption is in direct conflict with the Tenth Circuit's interpretation of ERISA preemption.

While the conflict between the Eighth and Tenth Circuits is most direct and obvious with respect to the statutory language and apprentice ratio aspects of the injunction, the conflict between the Circuits is much deeper. The Tenth Circuit analysis appropriately follows recent precedent of this Court in analyzing the statute to determine if it is of the type Congress intended to preempt through passage of ERISA.

The Eighth Circuit follows the more expansive reading of ERISA preemption that existed before *Travelers*. Under the Tenth Circuit's analysis, both the sprinkler fitter statute, and the rules promulgated pursuant to that statute, are not preempted. This Court should grant a writ of certiorari to resolve the conflict between the circuits on this matter.

CONCLUSION

The Eighth Circuit decision directly conflicts with a decision of the Tenth Circuit, *Willmar Electric*, in its analysis of the statutory language in the Minnesota sprinkler fitter statute and in its analysis of ratio requirements established by the rules. The Eighth Circuit failed to follow this Court's precedent in determining the scope of statutes and rules Congress intended to preempt in enacting ERISA and in the distinction between the ERISA plan and the substantive services funded through the plan. For all of these reasons, petitioner, Sprinkler Fitters Local 417, respectfully requests this Court to grant its petition for writ of certiorari, and issue a writ of certiorari to the Eighth Circuit to resolve the important federal questions raised by the decision.

DATED: March 18, 2002

WILLIAMS & IVERSEN, P.A.
Richard A. Williams, Jr.
Counsel of Record
Paul W. Iversen
1611 West County Road B, Suite 208
Roseville, MN 55113
651-848-0280/Phone
651-848-0282/Fax

ATTORNEYS FOR PETITIONER
SPRINKLER FITTERS LOCAL 417

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3230 Civil 3-94-97 (MJD/JMM)

Minnesota Chapter of Associated Builders and Contractors, Inc., a Minnesota corporation; North Central Chapter of the American Fire Sprinkler Association, an unincorporated association; Allied Mechanical Systems of Hutchinson, Inc., a Minnesota corporation; Ebert & Hinson Fire Protection, Inc., a Minnesota corporation; and General Sprinkler Corporation, a South Dakota corporation,	*	
Plaintiffs-Appellees,	*	
v.	*	Appeal from the United States District Court for the
Minnesota Department of Public Safety and Michael Jordan, Commissioner of Public Safety,	*	District of Minnesota
Defendants-Appellees,	*	
Sprinkler Fitters Local 417,	*	

	*
Intervenor-Appellant	*
	*
Building and Construction	*
Trades Department,	*
AFL-CIO,	*
	*
Amicus Curiae	*

No. 00-3230

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199)

October 5, 2001

A true copy

ATTEST: Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3230

Minnesota Chapter of Associated Builders and Contractors, Inc., a Minnesota corporation; North Central Chapter of the American Fire Sprinkler Association, an unincorporated association; Allied Mechanical Systems of Hutchinson, Inc., a Minnesota corporation; Ebert & Hinson Fire Protection, Inc., a Minnesota corporation; and General Sprinkler Corporation, a South Dakota corporation,	* Order Denying Petition for Rehearing and for Rehearing En Banc
Appellees,	
v.	
Minnesota Department of Public Safety and Michael Jordan, Commissioner of Public Safety,	
Appellees,	
Sprinkler Fitters Local 417,	

Appellant,	*
	*
Building and Construction Trades Department, AFL-CIO,	*
	*
Amicus Curiae.	*

The petition for rehearing en banc is denied. Judge Bye would grant the petition.

The petition for rehearing by the panel is also denied.

(5128-010199)

December 18, 2001

Order entered at the Direction of the Court

s/Michael E. Gans

Clerk, U. S. Court of Appeals, Eighth Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-3230

Minnesota Chapter of Associated Builders and Contractors, Inc., a Minnesota corporation; North Central Chapter of the American Fire Sprinkler Association, an unincorporated association; Allied Mechanical Systems of Hutchinson, Inc., a Minnesota corporation; Ebert & Hinson Fire Protection, Inc., a Minnesota corporation; and General Sprinkler Corporation, a South Dakota corporation,	*	
Plaintiffs-Appellees,	*	
v.	*	Appeal from the United States District Court for the
Minnesota Department of Public Safety and Michael Jordan, Commissioner of Public Safety,	*	District of Minnesota
Defendants-Appellees,	*	

Sprinkler Fitters Local 417, *
*
Intervenor-Appellant *
*
Building and Construction *
Trades Department, *
AFL-CIO, *
*
Amicus Curiae *

Submitted: May 17, 2001

Filed: October 5, 2001

Before MORRIS SHEPPARD ARNOLD and BYE, Circuit Judges, and GAITAN,[1] District Judge.

GAITAN, District Judge

This case presents the issue of whether portions of the Minnesota Sprinkler Fitter statute and rules which require contractors to adopt approved apprenticeship programs is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § § 1001, et seq. ("ERISA"). The district court held that the statute and rules were preempted and issued a permanent injunction preventing enforcement of the apprenticeship regulations. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1292(a)(1) and affirm.

---

[1] The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri, sitting by designation.

I. BACKGROUND

In 1992, the Minnesota legislature passed the Sprinkler Fitter Licensing Law which comprehensively regulated the fire protection industry in Minnesota. See, 1992 Minnesota Laws, Chap. 508. The statute was codified as Minn.Stat.Chap. 299M. Section 299M.04 gave statutory authority to the Minnesota Department of Public Safety to promulgate rules governing Chap. 299M. One of the statutory provisions of the Sprinkler Fitter Licensing statute was the requirement that only licensed journeymen and registered apprentices could perform fire protection work. The law required apprentices to be actively enrolled in a registered apprenticeship program and registered with a federal or state agency that approved apprenticeship programs.

In 1994, the Minnesota Department of Public Safety issued rules putting into effect the statutory provisions of Minn.Stat.Chap. 229M. The rules defined "federal approval agency" as "the United States Department of Labor, Bureau of Apprenticeship and Training" and the "state approval agency" was defined as "the Department of Labor and Industry or a state agency in Minnesota or another state if the commissioner determines that the state agency approves training programs and monitors apprentice or trainee progress in a manner comparable to that done by the Department of Labor and Industry or by the United States Department of Labor, Bureau of Apprenticeship and Training." Minn.R. 7512.0100, subps. 7, 14.

The statute and rules require all Minnesota sprinkler contractors to maintain an apprenticeship program approved by the Minnesota Department of Labor and Industry and to register all of their apprentices in the approved apprenticeship program. Minn.R. 7512.0 100, subps. 1,7,14; Minn. R.7512.0900, subp. 3; Minn.R. 7512.2100. Contractors

without an approved program could not employ apprentices in the state.

To obtain an approved apprenticeship program, contractors had to meet a number of requirements: 1) the apprenticeship program had to be of the same duration as the majority of apprenticeship programs on file with the Department of Labor and Industry; Minn. Stat. § 178.06; Minn. R. 5200.0320, subp. 1; Minn.R. 5200.0390, subp. 1; 2) the apprentice wage structure had to be based on the prevailing wage for sprinkler fitters in the county in which the contractor was headquartered, Minn.R. 5200.0390, subp. 2; 3) contractors had to adopt the same graduated pay scale for apprentices as was found in the majority of apprenticeship programs on file with the Department of Labor and Industry, Minn.R. 5200.0320, subp. 10; Minn.R. 5200.0390, subp. l; 4) apprenticeship programs had to provide for at least 144 hours of "related" or classroom instruction per year, Minn. Stat. § 178.07, Minn.R. 5200.0320, subp. 11; and 5) contractors had to register apprentices in accordance with the journeyman-apprentice ratios established by the Department of Labor and Industry.[2]

In 1994, plaintiffs, the Minnesota Chapter of Associated Builders and Contractors ("ABC") and certain affiliated contractors, brought suit in the district court seeking to enjoin portions of the Minnesota statute and rules governing the apprenticeship programs. The parties stipulated to a temporary injunction barring enforcement of the statute and rules while the court determined the issues raised in the complaint. In early 1995, the parties filed cross motions for summary judgment and in March 1996, the district court issued an order finding that the statute and rules were preempted by ERISA and permanently enjoined the State

[2] An employer may register one apprentice sprinkler fitter for the first journeyman sprinkler fitter employed, and one apprentice sprinkler fitter for each three journeyman sprinkler fitters employed thereafter.

Department of Public Safety from enforcing those provisions of the statute and rules. That order and permanent injunction were not appealed and remain in effect. The statute and rules have not been repealed or changed since the injunction was issued.

On February 1, 2000, Sprinkler Fitters Local 417, a labor organization representing journeyman and registered apprentice sprinkler fitters in the State of Minnesota, moved to intervene in the case and to have the injunction dissolved due to an intervening change in the law. The union claimed that the Supreme Court's decision in California Div. of Labor Standards Enforcement v. Dillingham Construction, N.A. Inc., 519 U.S. 316, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997), made the injunction "inappropriate," in light of new criteria established by the Court for determining whether ERISA preempted state law. ABC opposed the motion. The district court granted the union's motion to intervene, but denied the motion to dissolve the injunction. The union filed the instant appeal.

The district court in its order denying the motion to dissolve the injunction noted that the Supreme Court in Dillingham recognized a distinction between laws which created incentives for the adoption of an approved apprenticeship plans or created indirect economic incentives, and those laws such as the Minnesota statute and rules, which required the adoption of an approved apprenticeship plans. The district court also found that the Supreme Court had not specifically overruled its earlier ERISA precedents, including those on which Boise Cascade Co. v. Peterson, 939 F.2d 632 (8th Cir. 1991), cert. denied, 505 U.S. 1213 (1992) were based. The district court thus found that Minnesota's statute and rules "related to" an ERISA plan under the "connection with" prong and were therefore preempted by ERISA.

The issue of whether the injunction issued by the district court has any continued legal basis is purely a question of law which we review *de novo.*

II. DISCUSSION

A. ERISA Preemption

"ERISA, codified at 29 U.S.C. § 1001-1461 (1994) 'is a comprehensive statute that sets certain uniform standards and requirements for employee benefit plans.'" Wilson v. Zoellner, 114 F.3d 713, 715 (8th Cir. 1997), quoting, Arkansas Blue Cross & Blue Shield v. St. Mary's Hosp., Inc., 947 F.2d 1341, 1343 n. 1 (8th Cir. 1991), cert. denied, 504 U.S. 957 (1992). "It was enacted in response to growing concerns about 'the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds.'" Carpenters Local Union No. 26 v. U.S. Fidelity & Guar. Co., 215 F.3d 136, 139 (1st Cir. 2000), quoting, Massachusetts v. Morash, 490 U.S. 107, 115, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989).

"To meet the goals of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans, Congress included an express preemption clause in ERISA for the displacement of State action in the field of private employee benefit programs." Wilson, 114 F.3d at 715-16 (internal citations and quotations omitted). In New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995), the Court stated:

> [w]e have found that in passing § 514(a), Congress intended 'to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government..., [and to prevent] the potential for conflict in substantive law...requiring the

> tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.'

Id. at 656, citing, Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142, 111 S.Ct. 478, 484, 112 L.Ed.2d 474 (1990).

ERISA's preemption clause states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title....

29 U.S.C. § 1144(a), § 514(a). "Thus, when state-law claims 'relate-to' ERISA plans, those claims are transmuted into ERISA claims." Carpenters Local Union No. 26, 215 F.3d at 139.

B. The Dillingham Decision.

Local 417 notes that the issue of whether ERISA preempts a particular state law has caused a great deal of confusion over the last twenty years. Local 417 argues that because the Supreme Court in Dillingham significantly changed the way in which preemption questions are analyzed, there is no longer any basis for the injunction and it should be dissolved.

In Carpenters Local Union No. 26, the Court explained:

> As the language of section 1144(a) makes plain, the incidence of ERISA preemption turns on the parameters of the phrase "relate to." See California

Div. of Labor Standards Enforcement v. Dillingham Constr., 519 U.S. 316, 324, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997). That locution is not self-defining, and the Justices have been at least mildly schizophrenic in mapping its contours. The Court initially glossed the phrase by portraying the scope of ERISA preemption as "deliberately expansive." Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987). As time passed, it grew more guarded, emphasizing the "starting presumption that Congress does not intend to supplant state law," New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995); accord, De Buono v. NYSA-ILA Medical & Clinical Services Fund, 520 U.S. 806, 813, 117 S.Ct. 1747, 138 L.Ed.2d 21 (1997), and warning that, unless congressional intent to preempt clearly appears, ERISA will not be deemed to supplant state law in areas traditionally regulated by the states, see Dillingham, 519 U.S. at 325, 117 S.Ct. 832; Travelers, 514 U.S. at 655, 115 S.Ct. 1671.

Importantly, these variations in emphasis have led the Court to conclude in recent years that the phrase "relate to," as used in ERISA's preemption provision, cannot be read literally.... To scale the phrase down to size, the Court has devised a disjunctive test: "A law relate[s] to a covered employee benefit plan for purposes of § 514(a) if it [1] has a connection with or [2] a reference to such a plan." Dillingham, 519 U.S. at 324, 117 S.Ct. 832 (citations and internal quotations omitted) (alternations in original)....

Travelers plainly signaled a significant analytic shift in regard to the "connection with" portion of the ERISA preemption inquiry, abandoning strict textualism in favor of a more nuanced approach:

> For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections. We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.

Carpenters Local Union No. 26, 215 F.3d at 139-140, quoting, Travelers, 514 U.S. at 656, 115 S.Ct. 1671; accord, Dillingham, 519 U.S. at 324, 117 S.Ct. 832.

Local 417 states that in light of this shift in the law, courts must now take a more practical view and look at the scope of the state statutes that Congress intended would survive ERISA and not presume that the statutes were preempted unless there was a clear indication. ERISA is concerned with the segregation and investment of funds and ensuring that funds are not depleted and that fiduciaries utilize the funds in the manner in which they were intended. Local 417 states that ERISA is concerned that funds set aside for apprenticeship and training programs are properly handled and accounted for, but is not concerned with the substantive requirements for these apprenticeship and training programs. The union argues that ERISA places no substantive regulations on any apprentice program and states that if Congress had intended that states would no longer be able to place any substantive requirement on apprentices it certainly would have stated so. As such Local 417 states there is no mention in the statute or its legislative history of an intention

to supersede all state regulation of apprentices. The union asserts that state regulation of apprenticeship standards is pervasive and was pervasive when ERISA was passed. In light of this, the union states that there is no mention by Congress of its attempt to preempt state regulation of substantive apprenticeship standards. Local 417 argues that this is persuasive evidence that Congress did not intend to preempt state laws regulating apprenticeship standards.

In Dillingham, the Supreme Court considered whether California's prevailing wage law was "related to" an employee benefit plan and thus preempted under ERISA. The Court found that it was not. In that case, California required contractors on public works projects to pay workers the prevailing wage in the project's location. Contractors could pay lower wages to apprentices who were participating in an approved apprenticeship program. However, if a contractor employed apprentices who were participating in apprenticeship programs which were not approved, they were required to be paid the prevailing journeyman's wage. In considering whether the California statute had a "connection with" ERISA plans, the Court first noted that "apprenticeship standards and wages paid on state public works have long been regulated by the States." Id. at 330, 117 S.Ct. 840. The Court stated:

> That the States traditionally regulated these areas would not alone immunize their efforts; ERISA certainly contemplated the pre-emption of substantial areas of traditional state regulation. The wages to be paid on public works projects and the substantive standards to be applied to apprenticeship training programs are, however, quite remote from the areas with which ERISA is expressly concerned – reporting, disclosure, fiduciary responsibility, and the like .... Given the paucity of indication in ERISA and its legislative history of any intent on the part of

> Congress to pre-empt state apprenticeship training standards, or state prevailing wage laws that incorporate them, we are reluctant to alter our ordinary assumption that the historic police powers of the States are not to be superseded by the Federal Act.... Accordingly, as in Travelers, we address the substance of the California statute with the presumption that ERISA did not intend to supplant it.

Id., at 330-332, 117 S.Ct. 840-41 (internal quotations and citations omitted).

> However, in analyzing the statute, the Supreme Court found:
>
> the apprenticeship portion of the prevailing wage statute does not bind ERISA plans to anything. No apprenticeship program is required by California law to meet California's standards.... If a contractor chooses to hire apprentices for a public works project, it need not hire them from an approved program (although if it does not, it must pay these apprentices journeyman wages). So apprenticeship programs that have not gained CAC approval may still supply public works contractors with apprentices. Unapproved apprenticeship programs also may supply apprentices to private contractors. The effect of [the California statute] on ERISA apprenticeship programs, therefore, is merely to provide some measure of economic incentive to comport with the State's requirements, at least to the extent that those programs seek to provide apprentices who can work on public works projects at a lower wage.

Id. at 332, 117 S.Ct. 841.

The Court found that the California statute:

> has the effect of encouraging apprenticeship programs – including ERISA plans – to meet the standards set out by California, but it has not been demonstrated here that the added inducement created by the wage break available on state public works projects is tantamount to a compulsion upon apprenticeship programs.... The prevailing wage statute alters the incentives, but does not dictate the choices, facing ERISA plans. In this regard, it is "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate." Travelers, 514 U.S. at 668, 115 S.Ct. 1683.... We thus conclude that California's prevailing wage laws and apprenticeship standards do not have a "connection with," and therefore do not "relate to," ERISA plans.

Id. at 333-334, 117 S.Ct. 842.

Local 417 argues that the injunction issued by the district court should be dissolved because of the change signaled by the Supreme Court in Dillingham. The Union also argues that previous caselaw relied on by the district court when it issued the injunction, Boise Cascade Corp. v. Peterson, 939 F.2d 632 (8th Cir. 1991), cert. denied, 505 U.S. 1213 (1992) is no longer valid.[3] However, there are important distinctions

[3] The Court finds it unnecessary to determine whether Boise Cascade is still good law in this Circuit, because in that case, the state conceded that the apprenticeship programs were "employee benefit plans" as defined by ERISA. In the instant case, there has been no such concession and thus the Court does not look to Boise Cascade as persuasive authority on this issue.

between the California prevailing wage law and the Minnesota statute and rules, which do not mandate dissolution of the injunction.

The Minnesota rule relating to Contractor Operating Requirements states: "A fire protection contractor may not employ a person to perform fire protection-related work unless the person is a managing employee, certified journeyman, or registered apprentice." Minn.R. 7512.0900, Subp. 3. The Minnesota statute defines "apprentice sprinkler fitter" as: "a person, other than a fire protection contractor or journeyman sprinkler fitter, who is regularly engaged in learning the trade under the direct supervision of a licensed fire protection contractor or journeyman sprinkler fitter and is registered with a state or federal approval agency." Minn. Stat. 299M.01, Subd. 2. As previously noted, a state approval agency is defined as the Department of Labor and Industry or a state agency in Minnesota or another state if the Commission determines that the state agency approves training programs and monitors apprentice training progress in a manner comparable to that done by the Department of Labor and Industry or by the United States Department of Labor, Bureau of Apprenticeship and Training. A federal approval agency is defined as the Bureau of Apprenticeship and Training. Minn. R. 7512.0100, subps. 7, 14.

The Minnesota rules relating to apprenticeship programs and agreements states: "[t]he minimum training standards to be met in an apprenticeship agreement must be the standards for the apprenticeship program registered with the division but must be no less than the Minnesota minimum standards listed in part 5200.0320." Minn.R. 5200.0310. The Minnesota minimum standards state: "It must be the policy of the employer that all apprentices employed in a trade covered under parts 5200.0290 to 5200.0420 must be governed by the terms of these standards and by the Minnesota voluntary apprenticeship law . . . ." Minn. Rule 5200.0320 Subp. 2. The rules governing apprenticeship programs set out in very

specific detail the length of an apprenticeship program, responsibilities of the apprentice, how an apprentice should be supervised, schedule of work processes, wage schedules, the amount of hours of related instruction required and the hours of work required. See, Minn. Rules 5200.0320, Subp. 1-15.

Thus, it is quite clear that the Minnesota statues and rules, unlike the California law, require apprentice programs to comply with the Minnesota specifications. The Minnesota statute and rules do more than merely encourage or provide economic incentives to contractors to hire apprentices who are registered in approved programs, the Minnesota statues and rules absolutely demand it. The statute unequivocally states that a "fire protection contractor may not employ a person to perform fire protection-related work unless the person is a managing employee, certified journeyman, or registered apprentice." Minn. Rule 7512.0900, subp 3. Thus, the Minnesota statute, unlike the California statute, "dictate[s] the choices facing ERISA plans." Dillingham, 519 U.S. at 334, 117 S.Ct. 842.

Local 417 argues that the statute does not require contractors to use apprentices and even if a contractor were to use apprentices, the statute does not prevent a contractor from using apprentices who are not part of an approved program, so long as they do not "install, connect, alter, repair, or add to a fire protection system." Local 417 argues that apprentices can learn by observation and by handing tools to a journeyman and by practicing at a training center. The union states that the statute simply gives a substantial economic advantage to contractors to have their apprenticeship programs approved and to register their apprentices in approved programs.

However, the Court does not find this argument persuasive. The purpose of an apprenticeship program is to teach individuals through on-the-job training. To say that an apprentice can still learn by simply observing and handing

tools to a journeyman would turn an apprentice into simply a laborer and provide no useful instruction in how to actually install a fire protection system. The statute does more than simply provide a powerful economic incentive, it prevents the use of apprentices who are not registered in approved programs. It is for this reason that the Court finds that the Minnesota statute differs from the California statute in Dillingham and why the Court finds that the Supreme Court's decision does not necessitate dissolution of the injunction.

Appellant also argues that a recent decision by the Tenth Circuit in Willmar Elec. Service Inc. v. Cooke, 212 F.3d 533 (10th Cir.), cert. denied, 531 U.S. 979 (2000), indicates that the Minnesota statute is not preempted by ERISA. In Willmar, the Court considered whether a Colorado statute which required supervision of apprentices in a one-to-one ratio by licensed journeymen was preempted by ERISA. The Court found that the statute was not preempted stating:

> [t]here is no direct restraint in the Colorado law on the number of apprentices that may be trained. Rather, the limit to which Willmar refers is the economic burden of requiring one-to-one supervision of apprentices. The Supreme Court has recognized that laws of general applicability inevitably affect ERISA plans, sometimes by increasing costs, but that fact alone does not warrant a finding that Congress necessarily intended to displace regulation of an area traditionally regulated by the States.

Id. at 538. The Court in Willmar found that the effect of the supervision ratio requirement was to indirectly increase the cost of the apprenticeship training and thus was directly analogous to the apprentice wage law in Dillingham. The Court stated: "[i]n Dillingham, if the contractor chose to hire an apprentice from a non-approved program, it was compelled by state law to pay journeyman's wages. In our

view this is comparable to the manner in which the Colorado law affects the Willmar training program – it does not prevent training, but it increases the cost associated with doing so." Id. at 538, n. 3. This is the key distinction between the California and Colorado statutes and Minnesota's statute. Minnesota's statute acts to actually *prevent* training. A fire protection contractor working in Minnesota simply cannot hire an apprentice from an unapproved program to "install, connect, alter, repair, or add to a fire protection system." There is no provision whereby a contractor can pay a higher wage if it wishes to do so, or hire more journeymen to supervise an apprentice. The statute simply does not allow apprentices who are not registered or who are not registered in approved programs to work as apprentice sprinkler fitters.

Thus, because the Dillingham and Willmar decisions are distinguishable, the Court does not find that these decisions dictate dissolution of the injunction issued by the district court in 1996. However, because the Dillingham decision was handed down after the injunction was issued, the Court will consider whether the Minnesota statute and rules have a "connection with" an employee benefit plan under the criteria set out in Dillingham and other Eighth Circuit cases.

C. The "Connection With" Test.

In applying § 1144, the Supreme Court has utilized a two-part test to determine whether a state law is preempted. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has [1] a connection with or [2] reference to such a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983). See also, Dillingham, 519 U.S. at 324,117 S.Ct. 837; De Buono, 520 U.S. at 813, 117 S.Ct. 1751.

In the district court, ABC did not challenge the union's argument that the statute was not preempted under the "refers to" prong of the Dillingham test, therefore the district court

did not analyze this issue. Thus, our consideration will similarly be limited to analyzing whether the Minnesota statute and rules are preempted under the "connection with" prong of the test.

In Dillingham, the Court stated "to determine whether a state law has the forbidden connection, we look both to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.... as well as to the nature of the effect of the state law on ERISA plans." Id. at 325, 117 S.Ct. 838 (internal quotations and citations omitted).

In analyzing the effect of a state law on an ERISA plan, courts have considered a variety of factors:

> [1] whether the state law negates an ERISA plan provision, [2] whether the state law affects relations between primary ERISA entities, [3] whether the state law impacts the structure of ERISA plans, [4] whether the state law impacts the administration of ERISA plans, [5] whether the state law has an economic impact on ERISA plans, [6] whether preemption of the state law is consistent with other ERISA provisions, and [7] whether the state law is an exercise of traditional state power. Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital, Inc., 947 F.2d 1341, 1344-45 (8th Cir. 1991)(citations omitted). In conducting this analysis, '[t]he court must still look to the totality of the state statute's impact on the [ERISA] plan-both how many of the factors favor preemption and how heavily each individual factor favors preemption are relevant.' Id. at 1345.

Prudential Ins. Co. of America v. Doe, 46 F.Supp.2d 925, 936 (E.D.Mo. 1999), quoting, Wilson, 114 F.3d at 717.

1) Do the Minnesota Statute and Rules Negate a Plan Provision?

ABC argues that the Minnesota statute and rules negate ERISA plan provisions by substituting the state's requirements for the range of terms found in ERISA apprenticeship plans. The union argues that nothing about the Minnesota statute negates any provision as to how an apprenticeship program will be funded, and therefore does not negate any ERISA plan provision. The Court finds that because the statute and rules dictate the terms of what constitutes an approved apprenticeship program, it negates plan provisions.

2) Do the Minnesota Statute and Rules Affect Relations Between Primary ERISA Entities or Impact the Structure of ERISA Plans?

"The primary ERISA entities include the employer, the plan, the plan fiduciaries, and the beneficiaries." Wilson, 114 F.3d at 718 (internal quotations and citation omitted). ABC argues that the statute and rules affect relations between the employer, (the plan administrator) and the employees, (the plan beneficiaries), by dictating how the employees must be trained and paid. The union argues that while the statute affects the substantive terms under which apprentices will be employed by the employer, the statute does not affect any provision with respect to whether a plan participant is entitled to received benefits. The Court finds that this is a distinction without a difference. This factor therefore weighs in favor of preemption.

3) Will the Statute and Rules Impact the Administration of ERISA Plans?

ABC argues that the statute impacts the administration of ERISA plans by requiring the employer to monitor its program to ensure that it complies with all of the state's requirements, i.e., required amount of on the job training, required wages and raises at required intervals, required amount of related instruction and the requisite amount of supervision by journeymen. The union argues that there is no impact on the administration of ERISA plans because the employer may still fund an apprenticeship program either through a separate fund which is an ERISA plan or through its general assets. The Court finds that this factor also weighs in favor of preemption. By specifying all of the various requirements the statute and rules directly influence how the ERISA plans are administered. The Court finds it immaterial that an employer may still fund an apprenticeship program through a separate fund. Thus, the Court finds that this factor also weighs in favor of preemption.

4) Will the Minnesota Statute and Rules Have an Economic Impact on the Plan?

ABC argues that the statute and rules by dictating the duration of the plans, the wages that must be paid to apprentices, the amount of instruction and the ratio of journeyman to apprentices have a direct economic impact on the plan. Local 417 admits that the statute and rules have an indirect economic impact on ERISA plans because meeting the standards required for registration could increase the costs over plans that did not meet the required standards. However, Local 417 argues that while this factor may weigh in favor of preemption, it is not enough to require preemption. Because the requirements imposed by the statute and the rules would

increase the costs of providing these programs, the Court finds that this factor also weighs in favor of preemption.

5) Is Preemption of the Minnesota Statute and Rules Consistent With Other ERISA Provisions?

ABC argues that preemption of the Minnesota statue and rules are consistent with other ERISA provisions because they do not impact any other ERISA provision in any way. Local 417 argues that preemption of the statute is not consistent with other ERISA provisions because ERISA has nothing to say regarding substantive apprenticeship standards. The Court cannot say that preemption of the Minnesota statute is either strongly supported by or inconsistent with or contrary to any other provision of ERISA. Therefore, the Court finds this factor to be neutral.

6) Whether the Minnesota Statute and Rules Are An Exercise of Traditional State Power.

ABC states that the Minnesota statute and rules are not an exercise of traditional state power because the state has not mandated the adoption of approved apprenticeship programs in the past. ABC argues that the statute at issue goes far beyond any regulation of apprenticeship that has occurred in either Minnesota or any other state. Local 417 argues that apprenticeship regulation is a traditional exercise of state power. The Supreme Court noted in Dillingham, 519 U.S. at 330, 117 S.Ct. 840, that "apprenticeship standards and the wages paid on state public works have long been regulated by the States." Thus, the Court finds that this factor weighs against a finding of preemption.

Considering all of the above factors, the Court finds that the Minnesota statute and rules which dictate the standards for an approved apprenticeship training program have a

sufficient connection to ERISA plans so as to require a finding of preemption.

D. The Savings Clause[4].

Although ERISA acts to preempt some state laws, it also contains a "savings clause" which exempts federal laws from ERISA preemption. The clause states:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in §§ 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.

29 U.S.C. § 1144(d). Local 417 argues that this provision saves from preemption any state law that would otherwise be preempted if it simply recognizes federal standards as being applicable within the state. Local 417 states that because the Minnesota statute and rules allow for approval of apprenticeship programs by either the Minnesota Department of Labor and Industry or the United States Department of Labor, the statute thus does not mandate adherence to the state standards and thus is not preempted.

ABC states that the Fitzgerald Act, 29 U.S.C. §§ 50, et seq. provides for the voluntary adoption of apprenticeship programs by employers and others. ABC asserts that a state may choose to follow either the federal guidelines administered by the Bureau of Apprenticeship and Training or may develop its own guidelines through a state apprenticeship

---

[4] ABC states that this argument was never raised by the defendants in either the original action or by the union on intervention. However, in its Reply Brief, Local 417 states that this argument was presented to the district court during oral argument on the motion to dissolve the injunction. Therefore, the Court finds the issue properly raised and will address it.

council. ABC argues that because Minnesota has developed its own guidelines through a state apprenticeship council, apprentice programs must be approved by this body. ABC states that the establishment of apprenticeship programs which comply with the Fitzgerald Act is entirely voluntary and an employer's failure to adopt an approved apprentice program or to register apprentices in the program has no bearing on a contractor's ability to employ apprentices within the state. ABC states that preemption of the Minnesota statute and rules will have no impact upon the Fitzgerald Act because contractors will not be required to adopt apprenticeship programs that comply with the Fitzgerald Act, but they will not be prevented from doing so either. Thus, because preemption would in no way impair enforcement of the Fitzgerald Act, ABC argues that the Savings Clause does not apply.

In reply, Local 417 argues that even though the Minnesota Department of Labor and Industry approves apprentice programs, the programs are approved for both federal and state purposes. Thus, Local 417 argues, Minnesota's apprenticeship standards are federal as well as state standards. Local 417 states that these federal standards were established pursuant to the Fitzgerald Act and to say that a state may not rely on these standards interferes with the federal law. Thus, the union argues the Savings Clause acts to prevent the preemption of Minnesota's statute and licensing laws.

In Minnesota Chapter of Associated Builders & Contractors Inc. v. Minnesota Dept. of Labor & Industry, 47 F.3d 975 (8th Cir. 1995), we considered whether ERISA preempted the apprenticeship portion of Minnesota's Prevailing Wage Law. The Prevailing Wage Law specifically exempted apprenticeship programs from having to pay the prevailing wage, if the programs had received either state or federal approval. The district court in that case found that although the apprenticeship program was an ERISA plan, the

apprenticeship exemption provisions of the statute were not preempted because preemption would have impaired the purposes of the Fitzgerald Act. Id. at 980. In reaching this determination, we distinguished the case of Electrical Joint Apprenticeship Committee v. MacDonald, 949 F.2d 270 (9th Cir. 1991), cert. denied, 505 U.S. 1204, 112 S.Ct. 2991, 120 L.Ed.2d 869 (1992). In that case the court found preempted an administrative application of the prevailing wage law exemption for apprentices because it required the apprentice programs to "comply with the standards of the State Committee, independent and apart from the regulation authorized and provided for by the Fitzgerald Act and its accompanying regulations." Id. at 274. We determined in Minnesota Chapter of Associated Builders & Contractors, that the Minnesota statue was different "[b]ecause Minnesota's apprenticeship exemption allows approval by either the state or federal agency and because it is essential to any apprenticeship program that an employer be allowed to pay lesser wages to apprentices in training, Minnesota's exemption is saved under ERISA's savings clause. 29 U.S.C. § 1144(d)." Id. at 981.

In the instant case, the rules state that an apprentice may be registered with either a state or federal approval agency. Minn. Rule 7512.2100, subp. 2C. However, the Department of Labor and Industry Rules relating to apprenticeship programs make no reference to approval by a federal agency, instead stating under Minimum Training Standards: "[t]he minimum training standards to be met in an apprenticeship agreement must be the standards for the apprenticeship program registered with the division but must be no less than the Minnesota minimum standards listed in part 5200.0320." Minn. R. 5200.0310. Further the Minnesota Minimum Training Standards state: "It must be the policy of the employer that all apprentices employed in a trade covered under parts 5200.0290 to 5200.0420 be governed by the terms of these standards and by the Minnesota voluntary

apprenticeship law. . ." Minn. Rule 5200.0320, subp. 2. The rules further provide that "[a]ll apprenticeship agreements must be submitted to the Division of Voluntary Apprenticeship for approval." Minn. Rule 5200.0340.

These rules dictate that an apprentice program follow the standards established by the State of Minnesota and do not offer the option of having an apprenticeship program which only meets federal standards. Thus, the Court determines that because the Minnesota statute and rules do not offer the choice of compliance with either state or federal standards, but instead mandate adherence to the state standards, they are preempted under ERISA. Further, the Court finds that preemption of the statute and rules will not "alter, amend, modify, invalidate, impair, or supersede" the Fitzgerald Act, because contractors may still adopt voluntary apprenticeship programs which follow the standards set forth by the federal government. Therefore, the Court finds that the Minnesota statute and rules are not saved from preemption by ERISA's Savings Clause.

III. CONCLUSION

Accordingly, for the foregoing reasons, we affirm the judgment of the District Court.

BYE, Circuit Judge, dissenting.

I disagree with the majority's conclusion that ERISA preempts the Minnesota Sprinkler Fitter statute and concomitant regulations. I believe that conclusion reflects a more expansive view of ERISA preemption than that expressed by the Supreme Court in California Div. of Labor Standards Enforcement v. Dillingham Const., 519 U.S. 316 (1997), and other recent decisions.

We are dealing with a matter traditionally regulated by the States, where we start with the presumption that ERISA

does not preempt the state law. Dillingham, 519 U. S. at 330-32. In areas of traditional state regulation, we must differentiate between a state law that dictates choices faced by ERISA plans when administering the funding or provision of benefits, and a state law that dictates substantive safety standards applicable to ERISA and non-ERISA programs alike. I believe that Dillingham, as well as several other recent Supreme Court decisions, instruct us that a state law of the former type is preempted, but the latter type is not. Compare Egelhoff v. Egelhoff, 121 S.Ct. 1322, 1329 (2001) (finding preemption where the state law "does dictate the choices facing ERISA plans *with respect to matters of plan administration.*") (emphasis added) (internal quotations omitted), with De Buono v. NYSA-ILA Med. & Clinical Serv. Fund, 520 U.S. 806, 815-16 (1997) (finding no preemption where the state law "impose[d] some burdens on the administration of ERISA plans" but dictated that both ERISA and non-ERISA owned or operated hospitals pay a tax, and therefore functioned as a law of general applicability irrespective of the existence of an ERISA plan), and New York State Conf. of Blue Cross & Blue Shield v. Travelers Ins. Co., 514 U.S. 645, 657, 660 (1995) (emphasizing ERISA's focus on the "nationally uniform *administration* of employee benefit plans" and finding no preemption where the state law imposed a surcharge that had an indirect economic influence on ERISA plans but did not "preclude uniform *administrative* practice or the provision of a uniform interstate benefit package if a plan wishes to provide one") (emphasis added).

Applying Dillingham, the Tenth Circuit found no preemption of a Colorado law setting substantive safety standards for apprenticeship training programs by requiring a one-to-one ratio of electrical journeyman to apprentices on jobsites. Willmar Elec. Serv. Inc. v. Cooke, 212 F.3d 533, 537-39 (10th Cir. 2000). The court addressed and rejected an argument that the law should be preempted because it

"dictated" the teacher-to-student ratio that ERISA plans must use in an apprenticeship training program:

> An examination of the objectives of ERISA and the effects of the Colorado law persuades us that this is not the type of regulation Congress had in mind in the preemption clause. The primary effect of the ratio requirement is to indirectly increase the cost of apprentice training. In this respect it is directly analogous to the apprentice wage law at issue in Dillingham. In requiring such supervision the Colorado law neither mandates nor limits the granting of benefits to employees.

Willmar, 212 F.3d at 538.

I find the Tenth Circuit's logic and reasoning in Willmar persuasive, and disagree with the majority's attempt to distinguish it on the grounds that Minnesota's law actually prevents apprentice training. The substantive safety standards in Minnesota's statute and regulations are perhaps more comprehensive than the Colorado law at issue in Willmar, but that is a difference in degree, not in kind. Both sets of laws have the same effect on ERISA plans; both indirectly increase the cost of apprentice training in order to comply with substantive safety standards set by the state, but neither "mandates nor limits the granting of benefits to employees." Id. Likewise, both function as laws of general applicability, indiscriminately requiring safety standards for ERISA and non-ERISA apprenticeship training programs alike.

"Indeed, if ERISA were concerned with any state action – such as medical care quality standards or hospital workplace regulations – that increased costs of providing certain benefits, and thereby potentially affected the choices made by ERISA plans, we could scarcely see the end of ERISA's pre-emptive reach, and the words 'relate to' would

limit nothing." Dillingham, 519 U.S. at 329. Applying Dillingham, we found no preemption for a Minnesota law that dictated ethical standards for physicians participating in an ERISA plan, concluding that "[n]othing in ERISA attempts to preempt the entire field of health care or the regulation of professional standards for physicians." Shea v. Esensten, 208 F.3d 712, 719 (8th Cir. 2000). We found it significant that "Minnesota's law [is one] of general application. It makes no reference to and functions irrespective of the existence of an ERISA plan." Id. at 717 (citations and internal quotations omitted).

Likewise, nothing in ERISA attempts to preempt the entire field of apprenticeship training programs. Minnesota's Sprinkler Fitter statute and concomitant regulations are laws of general application, which function irrespective of the existence of an ERISA plan in their indiscriminate imposition of substantive safety standards. I find it inconsistent for us to hold in Shea that substantive quality standards in the medical field are not preempted, while holding that substantive safety standards in the fire protection industry are preempted.

I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Chapter of Associated Builders and Contractors, Inc., a Minnesota corporation,

Plaintiff,

v.

Minnesota Department of Public Safety and Michael Jordan, Commissioner of Public Safety,

Defendant.

Civil File No. 94-97 (MJD/JMM)

ORDER

DISCUSSION

This matter is before the Court on a motion by Sprinkler Fitters Local 417 ("Intervener") to intervene and to dissolve an injunction this Court issued on March 26, 1996. The underlying case arose from a challenge to Department of Public Safety rules enforced pursuant to Minnesota's Fire Protection Industry Licensing Law. See Minn. Stat. § 299M.01 (1994), et. seq.; and Minn. R. § 7512.2100-.2400 (1994). Minnesota Chapter of Associated Builders and Contractors ("Plaintiff") argued that certain rules requiring apprentice sprinkler fitters to be registered with a state or federal apprenticeship program were preempted by the Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et. seq. By Order dated March 26, 1996, this Court enjoined Defendant from the enforcement of apprenticeship regulations due to preemption by ERISA. See

Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Department of Public Safety and Michael Jordan, Commissioner of Public Safety, Civ. No. 3-94-97 (March 26, 1996). In the present matter, Sprinkler Fitters Local 417 has moved to intervene and to dissolve the injunction, arguing that this Court relied on the Eighth Circuit's decision in Boise Cascade Corp. v. Peterson, 939 F.2d 632 (8th Cir. 1991) to determine that Minnesota's sprinkler fitter statute "related to" an ERISA plan and was thus preempted. Sprinkler Fitters Local 417 argues that in light of the Supreme Court's decision in California Division of Labor Standards Enforcement v. Dillingham Construction, 519 U.S. 316 (1997), this Court must undergo a specific two-part analysis. Ultimately, Sprinkler Fitters Local 417 argues that the Minnesota law in question does not "relate to" an ERISA plan. Defendant Minnesota Department of Public Safety does not object to intervention by Sprinkler Fitters. Although Defendant "takes no further position relative to whether this Court should dissolve the injunction," Defendant does not object to an order granting Interveners injunctive relief, as it buttresses Defendant's prior position. Plaintiff opposes both the motion to intervene and the motion to dissolve the injunction. Based on the arguments of the parties, this Court determines that Sprinkler Fitters' motion is timely, involves a question of law in common with the main action, and that review of the Court's prior decision will not unduly prejudice the adjudication of the rights of the original parties. Accordingly, Sprinkler Fitters is entitled to permissive intervention pursuant to Fed. R. Civ. Pro. 24(b). The Court now addresses Intervener's motion to dissolve the injunction.

Dillingham concerned whether the pre-emption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. § 1001 et. seq., supersedes California's prevailing wage law to the extent that the law prohibits payment of an apprentice wage to an

apprentice trained in an unapproved program. 519 U.S. at 319. The State of California requires a contractor on a public works project to pay its workers the prevailing wage in the project's locale. An exception to this requirement permits a contractor to pay a lower wage to workers participating in an approved apprenticeship program. Id. The Court held that California's law does not "relate to" employee benefit plans, and thus is not preempted. Id. In making this determination, the Court applied a two-part inquiry. Id. at 324. A "law 'relates to' a covered employee benefit plan for purposes of § 514(a) 'if it [1] has a connection with or [2] a reference to such a plan.'" Id.

In analyzing whether a law "refers to" an ERISA plan, the Court found that "approved apprenticeship programs need not necessarily be ERISA plans." Id. at 325. The Court noted that under California law, an apprenticeship program "can be maintained by a single employer, and its costs can be defrayed out of that employer's general assets," characteristics which indicate that California's apprenticeship program "is not an ERISA plan." Id. at 326. The Court suggested that unfunded apprenticeship programs are not covered by ERISA. Id. at 327.

In the present matter, Plaintiff does not challenge Intervener's argument that Minnesota's statute concerning the sprinkler fitter apprentice programs is not preempted by ERISA under the "refers to" prong of the Dillingham test. Accordingly, this Court must determine whether the Minnesota's law is nevertheless preempted if it has a "connection with" an ERISA plan.

In analyzing whether a law "has a connection with" an ERISA plan, and is thus, preempted by it, the Court in Dillingham distinguished state statutes that "mandated employee benefit structures or their administration" from state statutes that had an "indirect economic influence" but did not "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself." Id. at

328. The Court found that California's prevailing wage statute was indistinguishable from New York's surcharge program, which did not bind plan administrators to any particular choice. Id. at 330. First, the Court determined that because states have traditionally regulated areas such as apprenticeship training standards, and ERISA and its legislative history offer no indication that Congress intended to preempt apprenticeship training standards or state prevailing wage laws that incorporate them, the Court began its analysis with the presumption that ERISA did not intend to supplant such state laws. Id. at 331-332. Then, the Court found that California's statute did not bind ERISA plans to anything, as no apprenticeship program is required by California law to meet California's standards. Id. at 330. The Court noted that "[i]f a contractor chooses to hire apprentices for a public works project, it need not hire them from an approved program (although if it does not, it must pay these apprentices journeyman wages)." Id. at 332. Additionally, "[u]napproved apprenticeship programs also may supply apprentices to private contractors." Id. Therefore, the Court found, the effect of California's prevailing wage law on ERISA apprenticeship programs was merely "to provide some measure of economic incentive to comport with the State's requirements, at least to the extent that those programs seek to provide apprentices who can work on public works projects at a lower wage." Id. In sum, California's prevailing wage statute "alters the incentives, but does not dictate the choices, facing ERISA plans." Id. at 334.

The Court recognized a distinction between laws such as the California prevailing wage law, which merely created an incentive for the adoption of an approved apprenticeship plan, or the New York surcharge law, which created an "indirect economic incentive," and the statutes and rules in the present case, which required the adoption of an approved apprenticeship plan. Furthermore, the Supreme Court did not overrule its early ERISA precedents, including those upon

which Boise Cascade Corp. v. Peterson, 939 F.2d 632 (8th Cir. 1991) were based. Therefore, this Court finds that Minnesota's rules and statutes providing a comprehensive framework for the training and registration of apprentices "relates to" an ERISA plan under the "connection with" prong.

ACCORDINGLY, IT IS HEREBY ORDERED THAT

Intervener's motion to intervene is GRANTED, and Intervener's motion to dissolve injunction is DENIED.

Dated: 8-9-00

s/

Michael J. Davis
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Minnesota Chapter of Associated Builders and Contractors, Inc., a Minnesota corporation, et al.,

Civil File No. 3-94-97

Plaintiffs,

MEMORANDUM AND ORDER

vs.

Minnesota Department of Public Safety and Michael Jordan, Commissioner of Public Safety,

Defendants.

Gregg J. Cavanaugh of Leonard, Street and Deinard appeared on behalf of plaintiffs.

Gilbert S. Buffington and Hubert H. Humphrey III of Attorney General's Office of State of Minnesota appeared on behalf of defendants.

This matter came before the Honorable Michael J. Davis on May 3, 1995 on the parties' respective motions for summary judgment. For the reasons set forth herein, both motions are granted in part and denied in part.

FACTUAL BACKGROUND

This is an action for declaratory and injunctive relief premised upon 29 U.S.C. § 1144(a), the preemption clause of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et seq. Plaintiffs, various contractors, and two industry associations, challenge Minnesota's regulatory scheme governing various aspects of fire protection apprenticeship. Plaintiffs further challenge an unrelated requirement as an ultra vires interpretation of the regulation's enabling statute. The essential material facts are undisputed, and each party has moved for summary judgment.

Minnesota's Fire Protection Industry Licensing Law, M.S.A. § 299M.01, et seq. provides for the registration of apprentice "sprinkler fitters", as novice fire protection employees are known. Section 299M.04 enables the Minnesota Department of Public Safety as follows:

> The commissioner shall adopt permanent rules for operation of the council, regulation by municipalities; permit; filing, inspection, certificate, and license fees; qualifications, examination, and licensing of fire protection contractors; certification of journeyman sprinkler fitters; registration of apprentices; and the administration and enforcement of this chapter...

These Rules were promulgated by the Department on February 14, 1994. Together with the statute, Minn. R. §§ 7512.2100-.2400 provide a comprehensive framework for the training and registration of apprentices. Specifically, apprentices must first be registered in an apprenticeship program approved by either the Minnesota Department of Labor and Industry (or an equivalent state agency) or the U.S. Department of Labor. See Minn. R. §§ 7512.0100(7),(14); 7512.2100 (2)(c). Unregistered apprentices may not perform

fire protection work in Minnesota. M.S.A. § 299M.03; § 7512.2100 (1).

Among the requirements for approval are specifications governing the wages which must be paid to apprentices. The wage rate must be either: (1) the Davis-Bacon wage rate for the county in which the employer is headquartered, (2) the Minnesota prevailing wage rate for that county, or (3) the wage rate specified in the applicable apprenticeship agreement that covers that ground. Minn. R. 5200.0390.[1] The actual wage must be determined by applying specified percentages to the wage rate which conform to those in approved agreements on file with the Bureau of Apprenticeship. The duration of the program must also conform to existing requirements.[2] The Division has approved apprenticeship plans lasting five years. See Exhibit G to the Affidavit of Frank Winiecki. Finally, an employer may register only one apprentice for the first "journeyman", or experienced sprinkler fitter employed, and an additional apprentice for every three journeymen thereafter employed. See Exhibit A, attached to the Affidavit of George Hawkins.

Additionally, Minn. R. § 7512.0800 requires each fire protection contractor to employ a "managing employee", the requirements for whom are described in §§ 7512.1300-.1600. This employee must have 10,000 hours of experience in the

---

[1] The Department does not challenge Plaintiffs' statement that the Rules so provide, despite the fact that these specific requirements are not enumerated in the 1993-1994 edition of Minnesota Rules. The parties have failed to provide the court with a copy of the State Register containing the final amended version of the regulations governing apprenticeship, and the court has been unable to locate them. In the absence of any dispute, the court accepts this description, which is offered solely for background, as true.

[2] It appears that prior to the mandatory legislation at issue here, similar rules governed voluntary apprenticeship plans which employers could submit to the Division of Voluntary Apprenticeship for approval. These practices are not challenged here.

area of fire protection design, installation, or the like, and must hold specified engineering credentials. A contractor may not perform fire protection work without such an employee.

Plaintiffs filed this action a few days after publication of these final regulations, seeking both temporary and permanent injunctive relief against the enforcement of the statute and regulations. Plaintiffs claim that the statue and Rules regulate employee welfare benefit plans, contrary to ERISA's preemption clause. Plaintiffs also claim that the "managing employee" regulation is not authorized by the statute. On March 14, 1994, the parties stipulated to an order temporarily enjoining the Department from requiring (a) that apprentices be registered, (b) that contractors employ only registered apprentices, and (c) that contractors employ managing employees. See Order of Judge Kyle, March 14, 1994. Discovery has been completed, and the matter is ripe for summary judgment.

DISCUSSION

Under Fed. R. Civ. P. 56, a moving party is entitled to summary judgment if the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of establishing the non-existence of a genuine issue of material fact. Id. At 323; City of Mt. Pleasant, Iowa v. Assoc. Elec. Co-op., 838 F.2d 268, 273 (8th Cir. 1988). Once it meets that burden, the non-moving party may not then "rest upon the mere allegations or denials of his pleading, but...must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If, based on the evidence, a reasonable jury could not return a verdict for the non-moving party, summary judgment is appropriate. 477 U.S. at 248.

Plaintiffs present three basic claims. First, it is claimed that the statute and Rules governing apprenticeship are preempted by ERISA, and are thus invalid. Second, the regulations deprive Plaintiffs of rights cognizable under 42 U.S.C. § 1983. Third, it is urged that the "managing employee" regulation is unauthorized by M.S.A. § 299M.01, et seq. Accordingly, Plaintiffs seek a declaration that these provisions are invalid, and may be permanently enjoined.

I. The Eleventh Amendment

Plaintiffs' ultra vires claim must be dismissed. It is clear that this Court lacks subject-matter jurisdiction to even consider this claim against state officials grounded in state law. The Eleventh Amendment, as construed by the Supreme Court, forbids federal courts from hearing suits such as this. Pennhurst State Hospital v. Haldeman, 465 U.S. 89, 107 (1984). This bar operates even where a claim is brought pursuant to pendent jurisdiction. 465 U.S. 89 at 121.

Apparently stunned by the Department's invocation of Eleventh Amendment immunity, Plaintiffs argue that it is inapplicable here. First, Plaintiffs claim that the Department has waived immunity by failing to raise it until its Answer to the Complaint, filed together with its summary judgment Motion more than a year after service. However, the Supreme Court has unambiguously stated that subject-matter jurisdiction is not waivable, and may be raised at any time. 465 U.S. 89 at 99, n.8. Plaintiffs next attempt to recast their ultra vires claim as one for relief under the Constitution: "The defendants' requirement that fire protection contractors employ a 'managing employee' has no basis in the underlying statute. Accordingly, its creation by the defendants violates the most fundamental principles of procedural and substantive due process." Pl's Mem. Opp. Summ. J., at 13. These principles are apparently so fundamental that Plaintiffs feel they need no further explanation. The Court holds that the

claim is still barred by the Eleventh Amendment. Pennhurst broadly admonishes against the intrusion on state sovereignty created "when a federal court instructs state officials on how to conform their conduct to state law". 465 U.S. at 106. Although a regulation may itself trammel constitutional rights, see Allen v. State of Minnesota, 867 F. Supp. 853, 865 (1994), Plaintiffs' recharacterization of their claim flies in the face of the Supreme Court's reasoning. Put another way, if an ultra vires claim under state law can, through mere draftsmanship, be transformed into a Due Process claim, the immunity secured by the Eleventh Amendment would be a fiction. Pennhurst requires otherwise.

II. Standing

The Department argues that certain individual Plaintiffs lack standing. However, the Department does not challenge the standing of the associational Plaintiffs. The complaint seeks only declaratory and injunctive relief, which the Supreme Court has held may properly be granted to associations. See Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 343-344 (1977). The Department's arguments with respect to the individual Plaintiffs are not persuasive.

A party seeking to invoke the jurisdiction of a federal court must demonstrate: (1) "injury in fact", or the invasion of a legally protected interest which is both concrete and particularized and actual or imminent; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. Northeastern Florida Contractors v. Jacksonville, 113 S.Ct. 2297, 2302 (1993). Each plaintiff satisfies this requirement.

A. General Sprinkler

Defendant argues that General Sprinkler's training program constitutes a "payroll practice" which is unrelated to ERISA. The falsity of this is demonstrated below, but in any event it is not a *standing* argument. Rather, Defendant is merely arguing that this Plaintiff should not prevail on the merits.

B. Ebert and Hinson

Defendant makes a similar contention with respect to this Plaintiff, but adds that its claim is moot because it is already in compliance with the Rules. Defendant urges that because E&H has an approved apprenticeship plan, there is no "adverse effect" created by the Rules. This argument is specious. Plaintiff is *required* to comply with these regulations, which it alleges (without dispute) it would prefer not to do. Affidavit of Hinson, para 7. Plaintiff alleges such compliance has a disruptive effect on its wage scale. Id., at para. 5. Mootness can only be demonstrated where there is no reasonable expectation that the wrong (here, enforcement of the statute and Rules) will be repeated and that events have completely and irrevocably eradicated the effects of the wrong. Barnes v. Healy, 980 F.2d 572, 580 (9th Cir. 1992). Defendant does not dispute the economic costs alleged by Plaintiff in conforming its practices to the Rules. The approval itself constitutes the Department's actual enforcement of the regulations against E&H. The effects of the "wrong" are thus continuing, and Plaintiff's claim is not moot. Cf., Boyle v. Anderson, 68 F.3d 1093, 1100 (8th Cir. 1995) (ERISA preemption claim lacked standing where State was not enforcing allegedly preempted requirements against plaintiffs.)

C. Allied Mechanical

Finally, Defendant argues that Allied Mechanical lacks standing because it abandoned the fire protection industry in 1993 or 1994 upon learning of the (then) proposed regulations. This surely is a strange argument. Defendant apparently concedes that promulgation of the challenged rules directly caused Allied Mechanical to cease this line of business, but nevertheless claims that Allied lacks standing. Allied contends in its brief that it intends to return to the industry once the regulations are enjoined. Although Allied does not directly support this claim by Affidavit, the uncontested statement of its Vice-President regarding the reasons for its cessation make this a reasonable inference. For Allied (and E&H, which wishes to add an apprentice), the enforcement of the regulations is a matter "capable of repetition, yet evading review." Arkansas AFL-CIO v. F.C.C., 11 F.3d 1430, 1436 (8th Cir. 1993). Allied Mechanical, having been scared off once by the State's regulations, is ready to give fire protection another try. Its claims are thus not moot.

The Plaintiffs have standing and the court has jurisdiction to consider the ERISA preemption issue.

III. ERISA Preemption

ERISA is a "comprehensive and reticulated statute". Alessi v. Raybestos-Manhattan, 451 U.S. 504, 510 (1981). Its preemptive force, by virtue of 29 U.S.C. § 1144(a) has been frequently demonstrated. See, e.g., Alessi, 451 U.S. 504 at 526; Shaw v. Delta Air Lines, 463 U.S. 85, 108 (1983); Local Union 598 v. I.A. Jones Construction Co., 846 F.2d 1213, 1221 (9th Cir. 1988); Boise Cascade Corp. v. Peterson, 939 F.2d 632 (8th Cir. 1991). In passing ERISA, Congress sought to free employee benefit plans from conflicting regulations by different states. Boyle v. Anderson, 849 F. Supp. 1307, 1310

D. Minn. 1994). ERISA contains broad preemption provisions which are designed to provide a single uniform set of regulations for the administration of employee benefit plans. Id. In brief, all state laws which "relate to" employee welfare benefit plans are invalid. Boise Cascade, 939 F.2d at 636-637. The term "employee welfare benefit plan" includes "any plan, fund or program...established or maintained by an employer...for the purpose of providing...apprenticeship or other training programs". 29 U.S.C. § 1002(1)(a). Consequently, if the practices regulated by the statute and Rules constitute an apprenticeship "plan", such regulation is invalid.

A. "Payroll Practices"

The Department urges that the Rules, despite their plain language, do not actually regulate apprenticeship plans. Rather, they relate to "payroll practices" which fall outside the scope of apprenticeship. The U.S. Department of Labor has clarified the scope of "apprenticeship or other training programs" by exempting various employer practices. 29 CFR § 2510.3-1 (b). One such practice is the "[p]ayment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training[.]" 29 CFR § 2510.3-1 (b)(3)(iv). The Department argues that the training programs at issue here (which it does not suggest fall outside the Rules) qualify for this exemption. This is incorrect.

The Department cites two short Department of Labor letter rulings on which it relies. Opinion 83-32 A, 1983 ERISA Lexis 28, attached as Exhibit 5 to Defendant's Mem. Supp. Summ. J.[3] describes a continuing education program

[3] Counsel for the Department is reminded of Local Rule 7.1 (b)(1): "Affidavits and exhibits *shall not be attached* to the memorandum of law[.]"

for accountants which the employer provides in-house. The Opinion notes that many states require licensed accountants to participate in continuing education programs. Although the Opinion does not specifically mention § 2510.3-1, it concludes that this practice is not an employee welfare benefit plan. A second ruling refers to an employer's "informal policy" of supporting, via tuition refunds, "educational and recreational programs" which its employees successfully complete. P/Opinion 76-01, 1976 ERISA Lexis 79, attached as Exhibit 4 to Defendant's Mem. Supp. Summ. J. There is no indication that these courses need actually relate to the employee's job. The Opinion states that § 2510.3-1(k) exempts unfunded tuition reimbursements.

These two Opinions are perfectly consistent with the clarifying regulations described above. They have, however, nothing to do with M.S.A. § 299M.01 and its accompanying regulations. As the term "apprenticeship" suggests, the Rules contemplate that a sprinkler-fitter trainee will be doing productive work during this time. The training is extensive; an August 1994 ruling from the Department of Labor and Industry required a five-year, 10,000 hour program of apprenticeship as a prerequisite to approval.[4]

As evidenced by the increasing wage to be paid for each year of apprenticeship, apprentices are fully expected to be working while learning their trade. It is clear that the Rules require much more than an occasional continuing education seminar or the apprentice's passive observation of the intricacies of sprinkler fitting. The Department has offered no other authority to support its "payroll practices" argument. The Rules fall outside of the exempting provisions of 29 CFR § 2510.3-1.

---

[4] See Exhibit G to the Affidavit of Frank Winiecki.

B. Relation to ERISA Plan

The Department then argues that the Rules do not impose an obligation which is sufficiently "plan-like" to thereby "relate to" an ERISA plan. The Department relies on an amicus brief submitted by the Solicitor General of the United States to the Supreme Court while it considered review of Boise Cascade Corp. v. Peterson, 939 F.2d 632 (8th Cir. 1991), cert. denied, 112 U.S. 3014 (1992).

At the outset, the Court observes that it is not impressed with the Department's theory of Rule 11 compliance. Presented with a recent Eighth Circuit decision involving closely analogous regulations promulgated by a sister state agency, the Department does not even attempt to distinguish Boise Cascade. Rather, it directs the court's attention to an amicus brief which urged the Supreme Court to *deny* review in Boise. This is not sound practice. Boise Cascade controls this case.[5]

Boise Cascade involved Minnesota's regulation of the training of pipefitting apprentices. The standards governing apprenticeship included enrollment in an approved apprenticeship program. Approval entailed compliance with a 1:3 jobsite ratio, and a minimum of four years of vocational training. 939 F.2d at 634.

The Court of Appeals began its analysis to the challenge of the ratio requirement by noting that the state had conceded that the apprenticeship program at issue was an "employee welfare benefit plan" as defined by ERISA. 939 F.2d at 637. While the Department has made no such concession here, the Boise Cascade court cited with approval the Ninth Circuit's holding in Hydrostorage, Inc. v. Northern California

[5] The Solicitor General persuasively argues that only funded apprenticeship plans are ERISA plans. The Supreme Court declined the opportunity to consider this argument, one implicitly rejected by the Eighth Circuit in Boise Cascade. This court is bound to follow the Eighth Circuit's analysis.

Boilermakers Local Joint Apprenticeship Committee, 891 F.2d 719 (9th Cir. 1987). Like Boise Cascade and the present case, Hydrostorage involved a set of standards governing the training of apprentices.[6] The Ninth Circuit described as a "difficult question" whether the "Standards" at issue constituted an apprenticeship "plan" or "program" within the meaning of 29 U.S.C. § 1002(1). The court's analysis is instructive:

> We conclude that the Standards satisfy this definition. The Standards consist of a detailed, 16-page document which specifies the duties and procedure of the Committee, the minimum qualification of apprentices, the maximum ratio of apprentices to journeymen on job locations, the terms and conditions of apprenticeships, and the hours and wages of apprentices. The Standards clearly embody "a method of design or action, procedure, or arrangement for accomplishment of a particular...object," in this case the training of apprentices. *Black's Law Dictionary* 1036 (5th ed. 1979). In addition, there is no question that the Standards were established "for the purpose of providing for its participants... apprenticeship or other training programs." 29 U.S.C. §1002(1).

891 F.2d at 728.

Boise Cascade, which accordingly invalidated the jobsite ratio, compels application of this analysis here. The Rules challenged by Plaintiffs are functionally equivalent (and to an extent, identical) to those which the Eighth and Ninth Circuits

---

[6] An immaterial distinction of Hydrostorage was that the standards related only to contractors performing work on publicly funded projects. 939 F.2d at 720-721.

found to constitute an ERISA plan. The Rules do not simply "relate to" such a plan, they compel its establishment as a prerequisite for performing fire protection work. They are thus preempted by ERISA.

This conclusion is unchanged by the Eighth Circuit's more recent decision in Minnesota Associated Contractors and Builders v. Minnesota Department of Labor, 47 F.3d 975 (8th Cir. 1995). At issue there was whether Minnesota's prevailing wage law, which governed state funded projects, was preempted by ERISA. The statute exempted from coverage those apprentices who were registered in a program approved by either the U.S. Department of Labor, or a state approval agency. 47 F.3d at 977. The court found no preemption, finding that the ERISA-related effect (presumably the favoring of one type of plan over another) was merely "tenuous, remote, or peripheral". As such, it was an exercise of "traditional state regulation" which Congress did not intend to displace. 47 F.3d at 979; Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985).

The Department seeks refuge under this exception, but it is inapplicable here. The effect of the presently challenged regulations is not simply an incident of a rule of general application. Rather, the Rules explicitly govern all material aspects of apprenticeship. This is a connection in no sense "peripheral" to the employers' apprenticeship plans (which the Minnesota Department of Labor in the above case also conceded were ERISA plans). The Boise Cascade panel considered this precise contention and rejected it. 939 F.2d at 638.

These authorities establish that the Department's regulation of the terms and conditions of sprinkler fitter apprenticeship is preempted by ERISA. Plaintiffs are thereby entitled to continued enjoinment of the enforcement of the apprenticeship regulations.

III. 42 U.S.C. § 1983

Neither party has meaningfully addressed Plaintiffs' claim for relief under § 1983. Although the court's holding on the claim for ERISA preemption suffices to provide the requested relief, Plaintiff's § 1983 claim may safely be expected to resurface, in light of 42 U.S.C. § 1988.

Plaintiffs' Complaint offers little illumination of precisely why § 1983 provides a remedy here. The Court will construe the claim as grounded in the "right" to be free from regulation preempted by ERISA. However, no such right exists. ERISA's preemption provision operates by virtue of the Supremacy Clause, contained in Article VI, cl. 2 of the Constitution. See New York Blue Cross and Blue Shield v. Travelers Insurance Co., 115 S.Ct 1671, 1676 (1995). The Supremacy Clause "is not a source of any federal rights[.]" Dennis v. Higgins, 498 U.S. 439, 440 (1991); Golden State Transit v. City of Los Angeles, 493 U.S. 103, 107 (1989). Once again, the Ninth Circuit has recently analyzed this very issue, and, consistent with these precedents, concluded that the successful assertion of ERISA preemption does not confer a § 1983 cause of action. Associated General Contractors v. Smith, 1996 WL 26783 (9th Cir. Jan. 22, 1996), at *4. See also Maryland Pest Control Association v. Montgomery County, 884 F.2d 160, 163 (4th Cir. 1989) (no § 1983 action based on FIFRA preemption). Accordingly, this claim must be dismissed.

ORDER

Based upon the foregoing files, records and proceedings, it is HEREBY ORDERED:

1. That Plaintiffs' motion for summary judgment is GRANTED with respect to the following:

a. That Minn. Stat. §299M.01, et seq. is preempted and invalid pursuant to 29 U.S.C. § 1144(a) insofar as it relates to the terms and conditions of apprenticeship;
b. That Minn. R. § 7512.2100-.2400 are preempted and invalid pursuant to 29 U.S.C. § 1144(a);
c. That the Department of Public Safety is permanently enjoined from requiring the registration of apprentice sprinkler fitters;
d. That the Department of Public Safety is permanently enjoined from requiring fire protection contractors to employ only registered apprentices;
e. That the Department of Public Safety is permanently enjoined from requiring fire protection contractors to employ apprentices and journeymen in a specified ratio;

2. That in all other respects, Plaintiffs' motion is DENIED;
3. That Defendant's motion is GRANTED with respect to the following:
   a. Count II of the Complaint, "Ultra Vires", is dismissed without prejudice;
   b. Defendant is entitled to summary judgment on Count II of the Complaint, "42 U.S. C. § 1983";
   c Defendant is entitled to summary judgment on Count IV of the Complaint, "Declaratory Relief" insofar as it relates to the "managing employee" requirement;
   d. Defendant is entitled to summary judgment on Count VI of the Complaint, "Temporary and Permanent Injunction", insofar as it relates to the "managing employee" requirement.
4. That Count V of the Complaint, "Temporary Restraining Order", is dismissed as moot in light of the Court's March 14, 1994 Order;
5. That in all other respects, Defendant's motion is DENIED.

Dated: 3-26-96

s/
Honorable Michael J. Davis
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Minnesota Chapter of Associated Builders and Contractors, Inc., a Minnesota corporation, et al.,

Plaintiffs,

vs.

Minnesota Department of Public Safety and Michael Jordan, Commissioner of Public Safety,

Defendants.

Civil File No. 3-94-97

ORDER

The Court hereby amends part 3b of the Order section of the Court's Memorandum and Order dated March 23, 1996 to read as follows:

b. Defendant is entitled to summary judgment on Count III of the Complaint, "42 U.S.C. § 1983";

Dated: June 4, 1996

s/
Michael J. Davis
United States District Court judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Minnesota Chapter of Associated Builders and Contractors, Inc., a Minnesota corporation; North Central Chapter of the American Fire Sprinkler Association, an unincorporated association; Allied Mechanical Systems of Hutchinson, Inc., a Minnesota corporation; Ebert & Hinson Fire Protection, Inc., a Minnesota corporation; and General Sprinkler Corporation, a South Dakota corporation.

Plaintiffs,

vs.

Minnesota Department of Public Safety and Michael Jordan, Commissioner of Public Safety,

Defendants.

Civil No. 3-94-97

ANSWER OF DEFENDANTS MINNESOTA DEPARTMENT OF PUBLIC SAFETY AND MICHAEL JORDAN, COMMISSIONER OF PUBLIC SAFETY

Defendants Minnesota Department of Public Safety and Michael Jordan, Commissioner of Public Safety, for their Answer to the Complaint for Declaratory and Injunctive Relief (hereinafter "Complaint") herein, admit, deny and allege as follows:

1. Deny the allegations contained in paragraph 1 of the Complaint.

2. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2, 3, 4, 5, 6 and 7 of the Complaint.

3. Admit the allegations contained in paragraphs 8, 9, 10, 11 and 12 of the Complaint.

4. Reallege as to paragraph 13 of the Complaint the responses herein to paragraphs 1 through 12 of the Complaint.

5. Allege as to paragraphs 14, 15, 16, 17, and 18 of the Complaint that the provision of law quoted or paraphrased in each respectively speaks for itself in its entirety.

6. Deny the allegations contained in paragraphs 19 and 20 of the Complaint.

7. Allege as to paragraphs 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35 of the Complaint that the provision of law or rule quoted or paraphrased in each respectively speaks for itself in its entirety.

8. Deny the allegations contained in paragraphs 36, 37, 38 and 39 of the Complaint.

9. Reallege as to paragraph 40 of the Complaint the responses herein to paragraphs 1 through 39 of the Complaint.

10. Deny the allegations contained in paragraph 41 of the Complaint.

11. Allege as to paragraphs 42, 43, and 44 of the Complaint that the provision of law or rule quoted or paraphrased in each respectively speaks for itself in its entirety.

12. Deny the allegations contained in paragraphs 45, 46 and 47 of the Complaint.

13. Reallege as to paragraph 48 of the Complaint the responses herein to paragraphs 1 through 47 of the Complaint.

14. Allege as to paragraph 49 of the Complaint that the provision of law quoted or paraphrased therein speaks for itself in its entirety.

15. Reallege as to paragraph 53 of the Complaint the responses herein to paragraphs 1 through 52 of the Complaint.

16. Deny the allegations contained in paragraphs 54, 55, and 56 of the Complaint.

17. Reallege as to paragraph 57 of the Complaint the responses herein to paragraphs 1 through 56 of the Complaint.

18. Deny the allegations contained in paragraphs 58, 59 and 60 of the Complaint.

19. Reallege as to paragraph 61 of the Complaint the responses herein to paragraphs 1 through 60 of the Complaint.

20. Deny the allegations contained in paragraphs 62, 63 and 64 of the Complaint.

AFFIRMATIVE DEFENSES

21. The Complaint fails to state a claim upon which relief can be granted.

22. The claims of Plaintiffs Ebert and Hinson Fire Protection, Inc. and Allied Mechanical Systems of Hutchinson, Inc. are moot.

23. All training or apprenticeship plans, programs or arrangements of Plaintiffs General Sprinkler Corporation, Ebert and Hinson Fire Protection, Inc. and Allied Mechanical Systems of Hutchinson, Inc. are "payroll practices."

24. This Court is without jurisdiction to consider any of Plaintiffs' claims in their second claim for relief relative to "managing employees," pursuant to the Eleventh Amendment of the United States Constitution and the opinion of the United States Supreme Court in Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900 (1984).

Dated: April 4, 1995

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

s/
GILBERT S. BUFFINGTON

Assistant Attorney General
Atty. Reg. No. 12762

445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(612) 296-6590

ATTORNEYS FOR
DEFENDANTS

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Minnesota Chapter of Associated Builders and Contractors, Inc., a Minnesota corporation; North Central Chapter of the American Fire Sprinkler Association, an unincorporated association; Allied Mechanical Systems of Hutchinson, Inc., a Minnesota corporation; Ebert & Hinson Fire Protection, Inc., a Minnesota corporation; and General Sprinkler Corporation, a South Dakota corporation,	Court File No. _____
Plaintiffs,	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
v.	
Minnesota Department of Public Safety and Michael Jordan, Commissioner of Public Safety,	
Defendants.	

Plaintiffs Minnesota Chapter of Associated Builders and Contractors, Inc., North Central Chapter of the American Fire Sprinkler Association, Allied Mechanical Systems of Hutchinson, Inc., Ebert & Hinson Fire Protection, Inc., and General Sprinkler Corporation, for their Complaint against the above-named defendants, state and allege as follows:

1. This action is based upon the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq., Article VI, Clause 2, of the United States Constitution, 42 U.S.C. § 1983, and related state grounds. Accordingly, this Court has jurisdiction over this action under 29 U.S.C. §§ 1132(e) and 1144 and 28 U.S.C. §§ 1331 and 2201, and this Court's jurisdiction over pendant state claims.

2. Because all parties reside in the State of Minnesota, and all relevant acts have occurred in the State of Minnesota, this action is properly venued in the District of Minnesota under 29 U.S.C. § 1132(e) and 28 U.S.C. § 1391.

PARTIES

3. Plaintiff Minnesota Chapter of Associated Builders and Contractors, Inc. ("Minnesota ABC") is a Minnesota corporation headquartered in Eden Prairie, Minnesota. Minnesota ABC is a trade association representing more than 220 contractors that perform construction work in the State of Minnesota. Minnesota ABC's members frequently bid and perform work on fire protection projects in Minnesota. Many of Minnesota ABC's members routinely train their employees through apprenticeship programs. Some of Minnesota ABC's members are signatory to collective bargaining agreements, and others are not.

4. Plaintiff North Central Chapter of the American Fire Sprinkler Association ("North Central AFSA") is a Minnesota unincorporated association headquartered in St. Paul, Minnesota. North Central AFSA is a trade association representing more than a dozen contractors that perform fire protection work in the State of Minnesota. North Central AFSA members frequently bid and perform work on fire protection projects in Minnesota. North Central AFSA members routinely train their apprentice sprinkler fitters through apprenticeship programs.

5. Plaintiff Allied Mechanical Systems of Hutchinson, Inc. ("Allied Mechanical") is a Minnesota corporation headquartered in Hutchinson, Minnesota. Allied Mechanical is a mechanical contractor that performs fire protection work in the State of Minnesota. Allied Mechanical bids and performs work on fire protection projects in Minnesota. Allied Mechanical routinely trains its apprentice sprinkler fitters through its training program. Allied Mechanical is not signatory to any collective bargaining agreement.

6. Plaintiff Ebert & Hinson Fire Protection, Inc. (Ebert & Hinson) is a Minnesota corporation headquartered in St. Cloud, Minnesota. Ebert & Hinson is a fire protection contractor that performs fire protection work in the State of Minnesota. Ebert & Hinson bids and performs work on fire protection projects in Minnesota. Ebert & Hinson routinely trains its apprentice sprinkler fitters through its apprenticeship program. Ebert & Hinson is not signatory to any collective bargaining agreement.

7. Plaintiff General Sprinkler Corporation ("General Sprinkler") is a South Dakota corporation headquartered in St. Paul, Minnesota. General Sprinkler is a fire protection contractor that performs fire protection work in the State of Minnesota. General Sprinkler bids and performs work on fire protection projects in Minnesota. General Sprinkler routinely trains its apprentice sprinkler fitters through its apprenticeship program. General Sprinkler is not signatory to any collective bargaining agreement.

8. Defendant Minnesota Department of Public Safety is an administrative agency of the State of Minnesota.

9. Defendant Michael Jordan is the Commissioner of Public Safety for the State of Minnesota.

THE MINNESOTA FIRE PROTECTION INDUSTRY LICENSING LAW

10. Sections 299M.01 through 299M.12 of the Minnesota Statutes (hereinafter "the statute") comprise the Minnesota fire protection industry licensing statute. Parts 7512.0100 through 7512.2800 of the Minnesota Rules (hereinafter "the rules") are the rules issued by the Minnesota Department of Public Safety and its Commissioner pursuant to the statute.

11. The statute and rules provide that a fire protection contractor must be licensed by the Minnesota Department of Public Safety in order to perform fire protection work. The statute and rules also set forth the requirements that a fire protection contractor must meet to obtain and hold a license. The statute and rules require that journeyman sprinkler fitters be properly certified, and apprentice sprinkler fitters be properly registered, before they may perform fire protection work for a fire protection contractor. The statute and rules also set forth requirements that the journeyman and apprentice sprinkler fitters must meet to obtain and hold certifications and registrations, respectively. The rules also require that a fire protection contractor employ a "managing employee," and specify the requirements for that position.

12. Under the statute and rules, the Minnesota Department of Public Safety and its Commissioner are responsible for enforcing the statute and rules.

FIRST CLAIM FOR RELIEF

(ERISA Preemption)

13. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 12 of the Complaint.

14. The United States Constitution and the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001,

et seq. ("ERISA"), provide for the preemption of certain state laws. Article VI, Clause 2, of the United States Constitution provides that "the Laws of the United States...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the...Laws of any State to the Contrary notwithstanding."

15. Section 1144 of Title 29 of the United States Code provides that "the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title

16. Section 1003(a) states that ERISA "shall apply to any employee benefit plan if it is established or maintained -- (1) by any employer engaged in commerce or in any industry or activity affecting commerce . . . ."

17. Section 1002(3) defines "employee benefit plan" as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

18. Section 1002(1) provides that an "employee welfare benefit plan" is "any plan, fund, or program...established or maintained by an employer...to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries... (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions)."

19. The plaintiffs' apprenticeship programs qualify as "employee benefit plans" under the foregoing provisions.

20. A number of the provisions of the statute and rules relate to and purport to regulate the employee benefit plans

described above, and are therefore preempted by Article VI, Clause 2, of the United States Constitution and 29 U.S.C. § 1144.

21. Section 299M.03, subdivision 1, of the Minnesota Statutes provides, in relevant part, that "[a] person may not sell, design, install, modify, or inspect a fire protection system, its parts, or related equipment, or offer to do so, unless annually licensed to perform these duties as a fire protection contractor."

22. Part 7512.0400, subpart 1, of the Minnesota Rules provides, in relevant part, that "a person must have a fire protection contractor license to perform fire protection-related work."

23. Section 299M.01, subdivision 7, defines "fire protection system" as "a sprinkler, standpipe, hose system, or other special hazard system for fire protection purposes only, that is composed of an integrated system of underground and overhead piping connected to a potable water source."

24. Part 7512.0100, subpart 9, defines "fire protection-related work, when applied to a licensed fire protection contractor, as the sale, design, installation, modification, or inspection of a fire protection system, its parts, or related equipment, or the offer to do so. Fire protection-related work, when applied to a journeyman sprinkler fitter or an apprentice sprinkler fitter, means the installation, connection, alteration, repair, or addition to a fire protection system."

25. Subdivision 6 of section 299M.01 defines a "fire protection contractor" as "a person who contracts to sell, design, install, modify, alter, or inspect a fire protection system or its parts or related equipment."

26. Section 299M.03, subdivision 2, provides that "[a] person may not install, connect, alter, repair, or add to a fire protection system, under the supervision of a fire protection contractor, unless annually certified to perform those duties as a journeyman sprinkler fitter or as a registered apprentice sprinkler fitter."

27. Part 7512.0900, subpart 3, provides that "[a] fire protection contractor may not employ a person to perform fire protection-related work unless the person is a managing employee, certified journeyman, or registered apprentice."

28. Subdivision 8 of section 299M.01 defines a "journeyman sprinkler fitter" as "a person who is certified as competent to engage in installing, connecting, altering, repairing, or adding to a fire protection system for and under the supervision of a fire protection contractor."

29. Part 7512.1800, subpart 1, provides that "[a] journeyman sprinkler fitter shall obtain a journeyman sprinkler fitter certificate before performing fire protection-related work." Parts 7512.1700 through 7512.2000 set forth the requirements that a journeyman sprinkler fitter must meet to obtain and hold such a certificate.

30. Subdivision 2 of section 299M.01 defines an "apprentice sprinkler fitter" as "a person, other than a fire protection contractor or journeyman sprinkler fitter, who is regularly engaged in learning the trade under the direct supervision of a licensed fire protection contractor or journeyman sprinkler fitter and is registered with a state or federal approval agency."

31. Part 7512.2100, subpart 1, provides that "[a]n apprentice sprinkler fitter shall register with the commissioner before performing fire protection-related work."

32. Part 7512.2100, subpart 2.c., provides that an apprentice's application for registration "must be accompanied by documentation that the applicant is registered with a state or federal approval agency." Subpart 3 of that part provides that the commissioner shall refuse to issue registration to an applicant who "is not registered with a state or federal approval agency." Part 7512.2200, subpart 2, provides that, for an apprentice sprinkler fitter to renew his registration, he must continue to be registered with a state or federal approval agency.

33. Part 7512.0100, subpart 7, defines "federal approval agency" as "the United States Department of Labor, Bureau of Apprenticeship and Training." Subpart 14 of that part defines "state approval agency" as "the Department of Labor and Industry or a state agency in Minnesota or another state if the commissioner determines that the state agency approves training programs and monitors apprentice or trainee progress in a manner comparable to that done by the Department of Labor and Industry or by the United States Department of Labor, Bureau of Apprenticeship and Training."

34. Parts 7512.2500 through 7512.2700 provide for the suspension and revocation of a fire protection contractor's license when the contractor has employed other than managing employees, certified journeymen, or registered apprentices to perform fire protection-related work.

35. Section 299M.08 provides that "[i]t is a misdemeanor for any person to intentionally commit or direct another person to commit either of the following acts: ... (2) to perform fire protection system work without a proper permit, when required, and without a license or certificate for that work."

36. The foregoing definitions of "apprentice" include employees who are employed under apprenticeship programs that are "employee benefit plans" under 29 U.S.C. § 1002(3).

37. Accordingly, the foregoing provisions of the statute and rules relate to and purport to regulate "employee benefit plans," including the employee benefit plans maintained by plaintiffs, and are therefore preempted under Article VI, Clause 2, of the United States Constitution and 29 U.S.C. § 1144.

38. If the foregoing provisions of the statute and rules relating to apprentices are enforced, plaintiffs will be irreparably harmed in that apprentices will be precluded from performing sprinkler fitter work and plaintiff contractors will be precluded from hiring apprentices to do sprinkler fitter work. Plaintiffs will suffer a direct and substantial loss of

business and profit as a result. Plaintiffs will also be deprived of their rights under the United States Constitution and ERISA.

39. Plaintiffs are therefore entitled to an order declaring that applicable provisions of the statute and rules are invalid, and enjoining defendants from enforcing said provisions.

SECOND CLAIM FOR RELIEF

(Ultra Vires)

40. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 39 of the Complaint.

41. The rules adopted by the Minnesota Department of Public Safety also fail to conform to the statute. Section 299M.04 of the Minnesota Statutes provides that "[t]he commissioner shall adopt permanent rules for operation of the council; regulation by municipalities; permit, filing, inspection, certificate, and license fees; qualifications, examination, and licensing of fire protection contractors; certification of journeyman sprinkler fitters; registration of apprentices; and the administration and enforcement of this chapter." Nowhere in the statute is there authority for the Commissioner of Public Safety to create a "managing employee" classification, or to create rules regarding such a classification.

42. Nonetheless, part 7512.0800, subpart 1, provides that "[a] fire protection contractor shall employ a person who meets the requirement for a managing employee contained in parts 7512.1300 to 7512.1600. The managing employee shall supervise the performance of all fire protection-related work by the contractor." Subpart 2 of that part provides that "a contractor shall not perform fire protection-related work after the contractor loses its managing employee."

43. Part 7512.1300, subpart 2, provides that, before a person can take the managing employee examination, the

person must have "10,000 hours of experience in designing, installing, modifying, or inspecting fire protection systems," must hold "a Level III or IV certification from the National Institute for Certification in Engineering Technologies, in the field of fire protection, and in the subfield of automatic sprinkler system layout," or must be "licensed as a professional engineer under Minnesota Statutes, section 326.03, and is competent in fire protection system design." Part 7512.1400, subpart 1.A., also provides that the person must successfully complete the managing employee examination.

44. Under parts 7512.2600, subpart 2.B., and 7512.2700, subpart 2.A., a fire protection contractor's license may be suspended or revoked if the contractor performs fire protection-related work without a certified managing employee.

45. The foregoing rules relating to the managing employee classification are invalid as outside the scope of the authority granted by the statute.

46. If the foregoing provisions of the rules relating to managing employees are enforced, plaintiffs will be irreparably harmed in that plaintiff contractors will be required to hire managing employees. If plaintiffs are unable to hire managing employees, they will be forced to discontinue business. In either case, plaintiffs will suffer a direct and substantial loss of business and profit as a result. Plaintiffs will also be deprived of their rights under Minn. Stat. §§ 299M.01, et seq.

47. Plaintiffs are therefore entitled to an order declaring that applicable provisions of the rules are invalid, and enjoining defendants from enforcing said provisions.

THIRD CLAIM FOR RELIEF

(Violation of Section 1983)

48. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 47 of the Complaint.

49. Section 1983 of Title 42 of the United States Code provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

50. The statute and rules constitute a deprivation of rights, privileges, and immunities secured by the Constitution and federal laws, including ERISA and Article VI, Clause 2, of the United States Constitution.

51. If the foregoing provisions of the statute and rules relating to apprentices are enforced, plaintiffs will be irreparably harmed in that apprentices will be precluded from performing sprinkler fitter work and plaintiff contractors will be precluded from hiring apprentices to do sprinkler fitter work. Plaintiffs will suffer a direct and substantial loss of business and profit as a result. Plaintiffs will also be deprived of their rights under the United States Constitution, ERISA, and 42 U.S.C. § 1983.

52. Plaintiffs are therefore entitled to an order declaring that applicable provisions of the statutes and rules are invalid, and enjoining defendants from enforcing said provisions.

FOURTH CLAIM FOR RELIEF

(Declaratory Relief)

53. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 52 of the Complaint.

54. The provisions of the statute and rules regarding apprentice sprinkler fitters are preempted by ERISA and Article VI, Clause 2, of the United States Constitution. Defendants' rules regarding the managing employee classification are ultra vires of the statute.

55. If the foregoing provisions of the statute and rules relating to apprentices and managing employees are enforced, plaintiffs will be irreparably harmed in that apprentices will be precluded from performing sprinkler fitter work, plaintiff contractors will be precluded from hiring apprentices to do sprinkler fitter work, and plaintiff contractors will be required to hire managing employees. If plaintiffs are unable to hire managing employees, they will be forced to discontinue business. In either case, plaintiffs will suffer a direct and substantial loss of business and profit as a result. Plaintiffs will also be deprived of their rights under the United States Constitution, ERISA, Minn. Stat. §§ 299M.01, et seq., and 42 U.S.C. § 1983.

56. Plaintiffs are therefore entitled to an order declaring that applicable provisions of the statute and rules are invalid, and may not be maintained or enforced by defendants.

FIFTH CLAIM FOR RELIEF

(Temporary Restraining Order)

57. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 56 of the Complaint.

58. The provisions of the statute and rules regarding apprentice sprinkler fitters are preempted by ERISA and

Article VI, Clause 2, of the United States Constitution. Defendants' rules regarding the managing employee classification are ultra vires of the statute.

59. If the foregoing provisions of the statute and rules relating to apprentices and managing employees are enforced, plaintiffs will be irreparably harmed in that apprentices will be precluded from performing sprinkler fitter work, plaintiff contractors will be precluded from hiring apprentices to do sprinkler fitter work, and plaintiff contractors will be required to hire managing employees. If plaintiffs are unable to hire managing employees, they will be forced to discontinue business. In either case, plaintiffs will suffer a direct and substantial loss of business and profit as a result. Plaintiffs will also be deprived of their rights under the United States Constitution, ERISA, Minn. Stat. §§ 299M.01, et seq., and 42 U.S.C. § 1983.

60. Plaintiffs are therefore entitled to an order temporarily restraining defendants from enforcing applicable provisions of the statute and rules.

SIXTH CLAIM FOR RELIEF

(Temporary and Permanent Injunction)

61. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 60 of the Complaint.

62. The provisions of the statute and rules regarding apprentice sprinkler fitters are preempted by ERISA and Article VI, Clause 2, of the United States Constitution. Defendants' rules regarding the managing employee classification are ultra vires of the statute.

63. If the foregoing provisions of the statute and rules relating to apprentices and managing employees are enforced, plaintiffs will be irreparably harmed in that apprentices will be precluded from performing sprinkler fitter work, plaintiff contractors will be precluded from hiring apprentices to do

sprinkler fitter work, and plaintiff contractors will be required to hire managing employees. If plaintiffs are unable to hire managing employees, they will be forced to discontinue business. In either case, plaintiffs will suffer a direct and substantial loss of business and profit as a result. Plaintiffs will also be deprived of their rights under the United States Constitution, ERISA, Minn. Stat. §§ 299M.01, et seq., and 42 U.S.C. § 1983.

64. Plaintiffs are therefore entitled to an order temporarily and permanently enjoining defendants from enforcing applicable provisions of the statute and rules.

WHEREFORE, plaintiffs pray that this Court enter an Order:

(1) Declaring applicable provisions of Minnesota Statutes sections 299M.01 through 299M.12 and Minnesota Rules parts 7512.0100 through 7512.2800 invalid;

(2) Temporarily restraining defendants from enforcing applicable provisions of Minnesota Statutes sections 299M.01 through 299M.12 and Minnesota Rules parts 7512.0100 through 7512.2800;

(3) Temporarily and permanently enjoining defendants from enforcing applicable provisions of Minnesota Statutes sections 299M.01 through 299M.12 and Minnesota Rules parts 7512.0100 through 7512.2800;

(4) Granting plaintiffs attorneys' fees and costs of suit; and

(5) For such other and further relief as this Court deems just and proper.

DATED: February 18, 1994.

s/
Gregg J. Cavanagh (#206878)

LEONARD, STREET AND DEINARD
Professional Association

Suite 2300
150 South Fifth Street
Minneapolis, Minnesota 55402
Telephone: (612) 335-1500

ATTORNEYS FOR PLAINTIFFS
MINNESOTA CHAPTER OF
ASSOCIATED BUILDERS AND
CONTRACTORS, INC., NORTH
CENTRAL CHAPTER OF THE
AMERICAN FIRE SPRINKLER
ASSOCIATION, ALLIED
MECHANICAL SYSTEMS OF
HUTCHINSON, INC., EBERT &
HINSON FIRE PROTECTION, INC.,
AND GENERAL SPRINKLER
CORPORATION

STATUTES INVOLVED IN THIS CASE

29 U.S.C. §1144(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter, shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. §1002(1). The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or daycare centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Minn. Stat. §299M.01 Definitions.

Subdivision 1. Scope. For the purposes of this chapter, the following terms have the meaning given them in this section.

Subd. 2. Apprentice sprinkler fitter. "Apprentice sprinkler fitter" means a person, other than a fire protection contractor or journeyman sprinkler fitter, who is regularly engaged in learning the trade under the direct supervision of a

licensed fire protection contractor or journeyman sprinkler fitter and is registered with a state or federal approval agency.

Minn. Stat. §229M.03 License or certificate required.

Subdivision 1. Contractor license. Except for residential installations by the owner of an occupied one- or two-family dwelling, a person may not sell, design, install, modify, or inspect a fire protection system, its parts, or related equipment, or offer to do so, unless annually licensed to perform these duties as a fire protection contractor. No license is required under this section for a person licensed as a professional engineer under section 326.03 who is competent in fire protection system design or a person licensed as an alarm and communication contractor under section 326.2421 for performing activities authorized by that license.

Subd. 2. Journeyman certificate. Except for residential installations by the owner of an occupied one- or two-family dwelling, a person may not install, connect, alter, repair, or add to a fire protection system, under the supervision of a fire protection contractor, unless annually certified to perform those duties as a journeyman sprinkler fitter or as a registered apprentice sprinkler fitter. This subdivision does not apply to a person altering or repairing a fire protection system if the system uses low pressure water and the system is located in a facility regulated under the federal Mine Occupational Safety and Health Act.

Minn. Stat. §299M.04 Rules, fees, orders, penalties.

The commissioner shall adopt permanent rules for operation of the council; regulation by municipalities; qualifications, examination, and licensing of fire protection contractors; certification of journeyman sprinkler fitters; registration of apprentices; and the administration and

enforcement of this chapter. Permit fees must be a percentage of the total cost of the fire protection work.

The commissioner may issue a cease and desist order to cease an activity considered an immediate risk to public health or public safety. The commissioner shall adopt permanent rules governing when an order may be issued; how long the order is effective; notice requirements; and other procedures and requirements necessary to implement, administer, and enforce the provisions of this chapter.

The commissioner, in place of or in addition to licensing sanctions allowed under this chapter, may impose a civil penalty no greater than $1,000 for each violation of this chapter or rule adopted under this chapter, for each day of violation. The commissioner shall adopt permanent rules governing and establishing procedures for implementation, administration, and enforcement of this paragraph.

Minnesota Rules, Chapter 7512.

7512.0100 DEFINITIONS.

Subp. 7. **Federal approval agency.** "Federal approval agency" means the United States Department of Labor, Bureau of Apprenticeship and Training.

Subp. 8. **Fire code.** "Fire code" means the Minnesota Uniform Fire Code adopted pursuant to Minnesota Statutes, section 299F.011, subdivision 1, and includes future amendments to the fire code.

Subp. 9. **Fire protection-related work.** "Fire protection-related work," when applied to a licensed fire protection contractor, means the sale, design, installation, modification, or inspection of a fire protection system, its parts, or related equipment, or the offer to do so. Fire protection-related work, when applied to a journeyman

sprinkler fitter or an apprentice sprinkler fitter, means the installation, connection, alteration, repair, or addition to a fire protection system.

Subp. 14. **State approval agency.** "State approval agency" means the Department of Labor and Industry or a state agency in Minnesota or another state if the commissioner determines that the state agency approves training programs and monitors apprentice or trainee progress in a manner comparable to that done by the Department of Labor and Industry or by the United States Department of Labor, Bureau of Apprenticeship and Training.

7512.0200 PURPOSE.

The purpose of parts 7512.0100 to 7512.2800 is to provide fire protection (sprinkler and standpipe) system rules relating to persons who sell, design, inspect, install, modify, alter, add to, repair, or connect the systems to ensure readiness intended for protecting life and property from fire and relating to the administration and enforcement of Minnesota Statutes, chapter 299M.

7512.0900 CONTRACTOR OPERATING REQUIREMENTS.

Subp. 3. **Contractor employees.** A fire protection contractor may not employ a person to perform fire protection-related work unless the person is a managing employee, certified journeyman, or registered apprentice.

Subp. 4. **Supervision of apprentices.** A fire protection contractor shall ensure that an apprentice sprinkler fitter working for the contractor is under the direct supervision of a managing employee or journeyman sprinkler fitter. Direct supervision means that a managing employee or journeyman

ensures that the apprentice is regularly engaged in learning the sprinkler fitter trade and oversees and directs the fire protection-related work performed by the apprentice such that:

A. the managing employee or journeyman actually reviews the work performed by the apprentice;

B. the managing employee or journeyman is on the job site and immediately available to the apprentice at all times for assistance and direction; and

C. the managing employee or journeyman is able to and does determine that work performed by the apprentice is performed in compliance with the fire code and the building code.

7512.1700 JOURNEYMAN SPRINKLER FITTER EXAMINATION.

Subp. 2. **Qualifications for examination.** A person may take the journeyman examination if the person submits a completed application for examination and if the person meets one of the following qualifications:

A. The person has 8,000 hours of experience in performing fire protection-related work.

B. The person has completed a sprinkler fitter program where the person was regularly engaged in learning the trade under the direct supervision of a licensed fire protection contractor or journeyman sprinkler fitter, while registered with a state or federal approval agency.

7512.2100 APPRENTICE SPRINKLER FITTER REGISTRATION.

Subpart 1. **Registration required.** An apprentice sprinkler fitter shall register with the commissioner before performing fire protection-related work.

Subp. 2. **Application for registration.** An initial application for an apprentice sprinkler fitter registration must be on a form provided or approved by the commissioner and must meet the following requirements:

A. The application must contain the full name, address, telephone number, date of birth, and driver's license number of the applicant. If the applicant does not have a driver's license, the application must contain the identification card number. If the applicant's driver's license or identification card was issued by another state or country, the application must list the name of the state or country.

B. The application must be accompanied by documentation that the applicant is in a sprinkler fitter program where the applicant is regularly engaged in learning the trade under the direct supervision of a licensed fire protection contractor or journeyman sprinkler fitter.

C. The application must be accompanied by documentation that the applicant is registered with a state or federal approval agency.

D. The application must be accompanied by a completed tax information form required by the commissioner of revenue under Minnesota Statutes, section 270.72.

E. The application must be accompanied by a registration fee of $15.

F. The application must contain or be accompanied by other information requested by the commissioner as necessary to determine whether the applicant meets the requirements for an apprentice of parts 7512.2100 to 7512.2300 and Minnesota Statutes, chapter 299M.

G. The applicant shall sign the application, verifying that the information in the application is true.

Subp. 3. **Issuing registration.** The commissioner shall issue an apprentice sprinkler fitter registration and card to an applicant, unless there is a reason to refuse to issue. The commissioner shall refuse to issue for the following reasons:

A. The application or items filed with the application do not meet the requirements of subpart 2.

B. The applicant is not regularly engaged in learning the trade under the direct supervision of a licensed fire protection contractor or journeyman sprinkler fitter.

C. The applicant is not registered with a state or federal approval agency.

D. The applicant is currently under revocation or suspension.

E. The commissioner of revenue notifies the commissioner of public safety under Minnesota Statutes, section 270.72, that the applicant owes the state delinquent taxes, penalties, or interest.

F. The applicant does not meet the requirements for an apprentice set forth in parts 7512.2100 to 7512.2300 and Minnesota Statutes, chapter 299M.

7512.2200 REGISTRATION RENEWAL.

Subpart 1. **Registration expiration date.** An apprentice sprinkler fitter registration expires at midnight on June 30 of each year. A registration is valid upon renewal until the following June 30.

Subp. 2. **Renewal application.** A renewal application for an apprentice registration must be on a form provided or approved by the commissioner and must contain the following information:

A. The application must contain the apprentice's name and apprentice number.

B. The application must list any changes to the apprentice's address, telephone number, and driver's license number.

C. The application must be accompanied by documentation of progress in the apprentice's sprinkler fitter program.

D. The application must be accompanied by a registration renewal fee of $15. If the application is submitted on or after June 1, the application must also be accompanied by a late fee of $15.

E. The application must contain or be accompanied by other information requested by the commissioner as necessary to determine whether the applicant meets the requirements for

an apprentice of parts 7512.2100 to 7512.2300 and Minnesota Statutes, chapter 299M.

F. The applicant shall sign the application, verifying that the information on the application is true.

Subp. 3. **Reasons to refuse renewal.** To renew an apprentice registration, the apprentice shall submit a completed registration renewal application to the commissioner. The commissioner shall accept a renewal application at any time on or before June 30. A person may not perform fire protection-related work after the registration expires and before a renewal registration is issued. The commissioner shall renew the registration, unless there is a reason to refuse to renew. The commissioner shall refuse to renew for any of the following reasons:

A. The application does not meet the requirements of subpart 2.

B. The applicant fails to make satisfactory progress in the applicant's sprinkler fitter program.

C. The applicant is currently under revocation or suspension.

D. The commissioner of revenue notifies the commissioner of public safety under Minnesota Statutes, section 270.72, that the applicant owes the state delinquent taxes, penalties, or interest.

Subp. 4. **Application after lapse.** Within one year after an apprentice registration has expired, a former apprentice may obtain another registration by following the renewal procedures of this part. An apprentice whose registration has been expired for more than one year shall comply with all

requirements and procedures of part 7512.2100 in order to obtain another registration. A person may not perform fire protection-related work after the registration expires and before another registration is issued.

7512.2300 APPRENTICE WORK REQUIREMENTS.

Subpart 1. **Active in approved program.** An apprentice shall annually make satisfactory progress in the apprentice's sprinkler fitter program.

Subp. 2. **Card.** An apprentice sprinkler fitter shall carry an apprentice sprinkler fitter card and a picture identification while working as an apprentice. An apprentice shall make both the apprentice card and the picture identification available upon request by the commissioner or an authority having jurisdiction. The apprentice card is not transferable.

7512.2400 EXAMINATIONS.

Subpart 1. **Examination specifications.** An examination must test for knowledge of the statutes and rules regulating the managing employee or journeyman and for the knowledge and ability to perform fire protection-related work in a competent, lawful, and safe manner.

Subp. 2. **Examination administration.** The commissioner shall develop and administer the examination. The commissioner may contract with a professional examination service to develop and administer the examination.

Subp. 3. **Examination application.** A completed examination application must include a nonrefundable examination fee.

Subp. 4. **Retesting.** An examinee who fails an examination one time may not repeat the examination for 60 days from the date of the failed examination. An examinee who fails the examination more than once may not repeat the examination for 180 days from the date of the failed examination.